APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1290

UNITED STATES OF AMERICA,
Petitioner,

—v.—

ITT CONTINENTAL BAKING COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 21, 1974
CERTIORARI GRANTED APRIL 29, 1974

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1290

UNITED STATES OF AMERICA,

Petitioner,

—v.—

ITT CONTINENTAL BAKING COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

INDEX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. C-1220

UNITED STATES OF AMERICA, PLAINTIFF

v.

ITT CONTINENTAL BAKING COMPANY, DEFENDANT

DOCKET ENTRIES

Date	PROCEEDINGS
1968	
2/ 9	COMPLAINT
	Summons issued
2/17	Marshal's return on Summons by serving ITT Continental Baking Co. with agent for service on 12/12/68
12/26	Signed (NC) Order for Extension of Time, for deft to have to & including 2/3/69 to file answer to complaint . . . . Stipulation. eod 12/27/68
1969	
1/27	MOTION of Deft. for Stay of Penalties
	Memorandum in Support of Defts. Motion for Stay of Penalties . . . Cert. of Mailing
2/ 3	Defts. Motion for a More Definite Statement
	Memo. in support of Defts. Motion for a More Definite Statement . . . Cert. Mailing

Date	PROCEEDINGS
1969	
2/11	Cert. of Service by Mail of next below.
	Memo. in Opposition to Defts. Motion for Stay of Penalties
2/14	MOTION of Deft. for Continuance
	Signed (HC) Order that the hearing on Defts. Motion for Stay of Penalties be continued until further order of this Court.
2/17	Memo. in opposition to Defts. Motion for a More Definite Statement
	Cert. of Service by Mail
2/24	Reply Memo. in Support of Defts. Motion for Stay of Penalties . . . . Cert. of Mailing
2/25	Reply Memo. in Support of Defts. Motion for a More Definite Statement . . . Cert. Mail.
3/ 6	Hearing (HC) on Motions for More Definite Statement & for Stay of Penalties . . . entry of appearance of J. J. Gercke FTC Washington, DC for Pltf. & John H. Schafer for Deft. . . Ordered: Motion for more definite statement is denied, with qualifications—motion for stay of penalties is not determined at this time . . . Ordered Mr. Schafer to prepare order. eod 3/7/69
4/ 1	Signed (HC) Order on next above hearing. eod 4/2/69
4/ 7	Defts. Interrogs. to Plaintiff—First Set . . . Cert. of Mailing
4/16	Signed (HC) Order for Extension of Time for Pltfs. to Answer or object to Interrogs. pursuant to Stipulation. eod 4/17/69
4/29	Answer to Pltf. U.S.A. to Defendant's Interrogatories
4/29	Reporter's Transcript—Defts. Motion for A More Definite Statement; Defts. Motion for Stay of Penalties on 3/6/69

Date	PROCEEDINGS
1969	
	Pltfs. Objections to Interrogatories.
5/14	MOTION of Deft. to Compel Further Answers to Defts. First Set of Interrog. to Pltfs.
	Memo. in Support of Motion to Compel Further Answers to Defts. First Set of Interrog. . . . Cert. of Mailing
6/ 2	Memo. in Opposition to Defts. Motion to Compel Further Answers to Defts. First Set of Interrogs. to Plaintiff
6/2	Cert. of Mailing
6/12	Reply Memo. in Support of Defts. Motion to Compel Further Answers . . . Cert. of Mailing
	MOTION of Pltf. for Entry of Order denying Defts. Motion to Stay Penalties.
	Memo. in Support of Pltfs. Motion for Entry of Order
	Cert. of Mailing
6/25	MOTION of Pltf. for Entry of Order denying defts. Motion to Stay Penalties.
	Memo. in Support of Pltfs. Motion for Entry of Order
	Cert. of Service.
6/27	Signed (HC) Order on Defts. Motion for Stay of Penalties, that the Motion be & is Denied without prejudice to Deft. eod 6/27/69
8/ 4	Cert. of Conference Between Counsel
	Cert. of Mailing
1970	
2/13	Hearing (HC) objections to Interrogs. & Motion to compel further answers . . . Ordered Objections Waived . . . Motion to Compel Granted, to be answered in 30 days. eod 2/13/70

Date	PROCEEDINGS
1970	
3/23	Signed (HC) Order Granting Defts. Motion to Compel Further Answers to Interrogs. eod 3/23/70
4/ 6	Further Answers to Defts. Interrogs. . . . Cert. of Mailing
	ANSWER . . . Request for Jury Trial. . . . Cert. of Service.
6/ 1	Notice of Pltf. to Take Depositions . . . Cert. of Service.
6/ 8	Amended Notice as To Deposition of Herbert Van Wyk . . . Cert. of Service.
6/19	Marshal's return on Deposition Subpoena to Testify or Produce Documents.
6/22	Entry of Appearance for Pltfs.
8/ 4	Deposition of Eugene Sneesby
8/ 6	Pltfs. Notice to Take Depositions . . . Cert. of Mailing
8/24	Pltfs. Amended Notice to Take Depositions . . . Cert. of Service.
9/ 4	Amended Notice as to Depositions by Pltfs . . . Cert. of Service.
9/23	Pltfs. Amended Notice as to Depositions of W. C. Noorda & Alexander Stepanzoff Cert. of Mailing
10/16	Depositions of Melvin Hebert, Don Wheelwright & Ralph Wheelwright
	Reporter's Transcript of proceedings held on 2/13/70
12/ 1	Preliminary Pre-Trial Conference (HC) . . . Ordered Amended Complaint and Answer maybe filed . . . Defts. request for Jury Demand denied . . . submitted Pre-Trial Order to be revised . . . eod 12/2/70

Date	PROCEEDINGS
1970	
12/ 1	AMENDED COMPLAINT
	ANSWER to Amended Complaint . . . Cert. of Service
2/ 8	Signed (HC) Pre Trial Order. eod 12/11/70
1971	
1/ 1	MOTION of Pltf. for Extension of Time . . . approved by Attny. for deft.
1/ 5	Signed (HC) Order that Pltf. may have to & including 1/11/71 to file brief in Support of complaint; deft. may have to 2/22/71 to file response; & Pltf may have to 3/8/71 to file reply brief. eod 1/8/71
1/ 8	Pltfs. Brief in Support of Complaint.
2/24	Brief for Defendant . . . Cert. of Service.
3/ 5	Supplemental Stipulation
3/ 9	Reply Brief for United States . . . Cert. of Service.
4/21	Placed on Trailing Calendar Commencing 5/24/71.
5/27	Trial to Court (FMW) 1st Day . . . Ordered: James Corkey, Joseph J. Gerckel & Henry Banta are admitted for the purpose of this trial . . . Ordered: that permanent injunction be issued as set forth in the complaint . . . Penalty of $5,000 be assessed as to count 1 relative to Bon Ton Acquisition . . . Penalty of $5,000 assessed as to Ct. 2 relative to the Wyoming Baking Co. acquisition . . . Counsel to submit approved findings of fact by later part of july 1971. eod 5/28/71
6/ 3	MOTION of Pltf. for New Trial or, in the Alternative, for a Further Hearing . . . Affidavit of Carolyn J. McNeill . . . Cert. of Service.
6/ 9	Signed (FMW) Order that Pltf. Motion for new Trial is denied

Date	PROCEEDINGS
1971	
7/16	Reporter's Transcript of Preliminary Pre Trial Conference held on 12/1/70
7/30	MOTION of Deft. for Partial Reconsideration
8/ 2	Signed (FMW) Findings of Fact and Conclusions of Law . . . Penalties of $5,000 should be imposed upon deft. on both Ct. 1 & 2 and that an injunction should enter against deft. in the terms of the Commission's consent order against Deft., said injunction to expire on 5/15/72 . . . eod 8/3/71.
	Signed (FMW) Order that the time which either party may file any motions directed to the Findings and Conclusions or the Final Judgment and Order is extended to 9/15/71 . . . 8/3/71.
	Signed (FMW) FINAL JUDGMENT AND ORDER . . . Judgment is entered for pltf. in the amount of $5,000 as to both Cts. I & II of the Amended Complaint . . . Judgment is entered for deft. on Ct. III of the Amended Complaint . . . that from the date of entry of this Final Judgment & Order until 5/15/72, deft. is ordered to cease and desist from acquiring the whole or any part of the stock engaged in any state in the United States in the production and sale of bread . . . eod 8/3/71.
9/13	Pltf. MOTION to Alter or Amend Judgment
	Memo. in Support of Motion to Alter or Amend Judgment . . . Cert. of Service.
	Memo. in Opposition to Defts. Motion for Partial Reconsideration
9/23	Memo. in Opposition to Pltfs. Motion to Alter or Amend Judgment filed by Deft. . . . Cert. of Service.

Date	PROCEEDINGS
1971	
9/29	Signed (FMW) Order that Pltfs. Motion to Alter or Amend Judgment & Defts. Motion for Partial Reconsideration are Denied. eod 9/29/71
10/ 1	Reporter's Transcript of proceedings beginning 5/27/71
11/26	NOTICE OF APPEAL by Pltf.
12/10	NOTICE of Cross-Appeal by Deft.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 72-1072

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ITT CONTINENTAL BAKING COMPANY, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1/26/72	Cause docketed; record on appeal, Vol. I, (transcript), Vol. II, orig., (over 300 pp.); docketing statement, orig. & 3 cc.; appearance—appellant — Edelstein, Shapiro; order—leave to docket out of time granted—HKP
	Order—assigned to General Calendar; appellant's brief due 3/7/72—Lewis
1/31/72	Appellant's motion to defer the filing of appendix until after the brief have been filed—0 & 3cc —c/s
	Order: Appellant granted to defer filing of appendix until after briefs have been filed, HKP
	Appellee's Motion to Dismiss—0 & 4cc—and appellee's memo. in support of motion to dismiss—0 & 4cc—c/s

DATE	FILINGS—PROCEEDINGS
1/31/72	Order: Assigned to Summary Calendar—Lewis
	Motion to Dismiss letter to appellant
2/ 3/72	Appearance—ITT Cont. Baking—Schafer, Norton, Welborn, Cortez
2/ 4/72	Appearance—US—Treece
2/10/72	Response of Aplt. to Aple's Motion to Dismiss—0 & 3cc—c/s
2/17/72	Appellee's reply memorandum in support of aple motion to dismiss—0 & 4cc—c/s
2/18/72	Submitted to Rule 8 Panel
2/24/72	Stipulation exhibits 1-19C; Stipulation exhibits 20-36A; Stipulation exhibits-transcripts, depositions, interrogatories and answers
3/ 6/72	Appellant US motion to extend time to file briefs —0 & 3cc—c/s
3/ 6/72	Order: Appellant's motion *granted* for ext. of time to file briefs to 3/31/72.—HKP
	Corrected First page of reply memo. in support of aple motion to dismiss
3/14/72	Set for Hearing May 1972 Term
3/30/72	USA's motion for ext. of time to file brief—0 & 3cc—c/s
3/30/72	Aplts (U.S.A.) motion for ext. of time to file brief granted as requested in paragraph 3 of motion Clerk-Rule 11 HKP
5/19/72	Motion to dismiss *only* argued and submitted—Hill, Barrett, Langley
6/24/72	Appellant's additional authority (Govt)—letter—0 & 4cc—c/s (to panel)
6/ 8/72	Appellee's Supplementary memorandum—in support of motion to dismiss—0 & 3cc—c/s—aplt not opposed to filing (to panel)

DATE	FILINGS—PROCEEDINGS
7/12/72	Opinion on motion to dismiss; *Hill*, Barrett, Langley
	Order: Motion to dismiss filed by appellee is *denied*.
7/28/72	Order—returned to General Calendar; appellant's brief due 8/27/72—Lewis
8/28/72	Appellant's Preliminary Brief—0 & 3cc—c/s
	Letter (cc) to Appellee's indicating pts of record to be included in Appendix
9/29/72	Appellee's brief—Preliminary brief c/s
10/ 2/72	Corrected page for appellants prelim. brief.—4cc; c/s
10/10/72	Appellant's motion for ext. of time to file reply brief—0 & 3cc—c/s & to enlarge the page limitation. (Fwd. to Judge Lewis)
10/18/72	Order: Appellant's motion to enlarge the page limitation of its combined "reply" brief is *granted*.
	Appellant *granted* to 10/30/72 to file "reply" brief. (Lewis)
10/26/72	Appendix—10cc—c/s
10/30/72	Appellant's motion for ext. of time to file brief—0 & 3cc—c/s
10/31/72	Order: Appellant's motion for ext. of time to file reply brief. GRANTED—TO: 11/13/72—HKP—Counsel notified.
11/ 6/72	Appellee's brief—25cc—c/s
11/13/72	Appellant's brief—25cc—c/s
11/15/72	Appellant's preliminary reply brief—0 & 3cc—c/s

DATE	FILINGS--PROCEEDINGS
11/24/72	Appellant's reply brief—25cc—c/s
12/ 4/72	Appellee (ITT) motion for ext. of time to file reply brief & to enlarge the page limitation—stipulation—0 & 3cc—c/s
12/ 4/72	Cross-appellant's (appellee's) motion for ext. of time and enlargement of size fwd. to Judge Lewis
12/ 5/72	Order: Motions of cross-appellant for ext. of time to 12/14/72 to file reply brief and for enlargement of page limitation for said brief *granted*. (Lewis)
12/14/72	Appellee ITT Continental's Reply Brief—25cc—c/s
1/22/73	Set for March Term—Denver, Colorado
2/ 2/73	ITT Continental's motion to change date of oral argument—orig. & 1cc
	Motion to Court
2/ 7/73	Order—calendar setting vacated—Hill
4/13/73	Set for May 1973 Term of Court
5/16/73	Letter from Appellee Schafer requesting changing argument from 3rd case on Tuesday 5/22/73 to 1st or 2nd on Tuesday 5/22/73—
	(Fwd. to Panel)
5/17/73	Letter from atty for ITT consenting to changing argument to 1st case on Tues. 5/22/73
	(Dist. to Panel for ruling at time of argument—)
5/22/73	Argued and submitted—Seth, Laramore, Doyle
5/29/73	Appellant's supplemental authority—0 & 3cc—c/s
	Appellee's supplemental authority—0 & 3cc—c/s (to panel)
6/ 1/73	Appellant's response to appellee's supplemental authority—0 & 3cc—c/s

DATE	FILINGS—PROCEEDINGS
	(Fwd. to Panel)
9/24/73	Opinion—*Seth*, Laramore (Court of Claims), Doyle
	Judgment: Case is remanded only for the imposition of a penalty by the trial court for the violation of the order in the Sheppard Baking Company acquisition as a single violation, in whatever amount the court sees fit within the statutory limits, otherwise the case is affirmed; Doyle, Circuit Judge, concurring
10/16/73	Mandate to District Court Clerk in Nos. 72-1072 and 72-1073
10/16/73	O ROA to Clerk, Volumes I, II and Stipulation to Exhibits 1-19C, Stipulation to Exhibits 20 thru 36-A, Stipulation to Transcript, Depositions, Interrogatories and Answers.
10/23/73	Receipt—Mandate
10/23/73	Receipt—O ROA See Docket Entry of 10/16/73 for Description.
2/25/74	Supreme Court Notice of Filing of Petition for Certiorari—73-1290, 2-21-74

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 72-1073

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ITT CONTINENTAL BAKING COMPANY, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1/26/72	Cause docketed; record on appeal, Vol. I (transcript), Vol. II, orig. (over 300 pp.); docketing statement, orig. & 3 cc.; appearance—appellee—Edelstein, Shapiro; order—leave granted to docket out of time—HKP
	Order—assigned to General Calendar; appellant's brief due 3/7/72—Lewis
	SEE NO. 72-1072 FOR ALL FURTHER DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT
FOR COLORADO

Civil No. C-1220

UNITED STATES OF AMERICA, PLAINTIFF

v.

ITT CONTINENTAL BAKING COMPANY, a corporation,
DEFENDANT

AMENDED COMPLAINT

COUNT I

1. The United States of America, by the United States Attorney for the District of Colorado, acting under the direction of the Attorney General of the United States, upon request of the Federal Trade Commission, brings this action under Section 11(1) of the Clayton Act, as amended, 15 U.S.C. Section 21(1), and under Section 5(a)(1) of the Federal Trade Commission Act, as amended, 15 U.S.C. Section 45(a)(1), to recover civil penalties and for other relief for violations of a final order to divest and to cease and desist issued by the Federal Trade Commission.

2. This Court has jurisdiction under 28 U.S.C. Sections 1337, 1345 and 1355, 1395 and under 15 U.S.C. 49.

3. ITT Continental Baking Company is a corporation organized and doing business by virtue of the laws of the State of Delaware with its offices and principal place of business located at Halstead Avenue, Rye, New York. Prior to September 13, 1968 this business entity was for purposes pertinent to this complaint known as Continental Baking Company, a Delaware corporation with its offices and principal place of business located at Halstead Avenue, Rye, New York. On or about September 13, 1968 Continental Baking Company merged into ITT Continental Baking Company, a wholly-owned subsidiary of International Telephone Telegraph Corporation, a corpor-

ation organized and doing business by virtue of the laws of the State of Delaware with its offices and principal place of business located at 320 Park Avenue, New York, New York. As used in this complaint the term defendant means Continental Baking Company when referring to acts and practices occurring prior to September 13, 1968 and to ITT Continental Baking Company when referring to acts and practices subsequent to September 13, 1968. Defendant is one of the largest producers, distributors and sellers in the United States of bread and bread-type rolls and of other bakery and food products, and is engaged, directly or indirectly through subsidiary and affiliated companies, in commerce as commerce is defined in Section 1 of the said Clayton Act, and Section 4 of the said Federal Trade Commission Act, in supplying bakery and food products to retail stores and to institutional and other organizations located throughout the United States and in the State of Colorado. During 1966, defendant had net sales of $589,542,830, of which approximately $300,000,000 is accounted for by the sale of bread and bread-type rolls.

4. On May 11, 1962, acting pursuant to and in accordance with Section 11(b) of the said Clayton Act and Section 5(b) of the said Federal Trade Commission Act, and with consent of defendant, the Federal Trade Commission issued its decision and order in a proceeding wherein defendant was charged with violating provisions of Section 7 of the said Clayton Act, and Section 5 of the said Federal Trade Commission Act. The said decision and order of the Commission, a true and correct copy of which is attached hereto and made a part hereof as Exhibit A, provides in Section III:

> "IT IS FURTHER ORDERED, That for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls

unless the Commission, on petition for modification of this Section III of this order, permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission."

5. The said decision and order of the Commission referred to in paragraph 4 were duly served on defendant by registered mail on or about May 15, 1962, and the said order became final by operation of law on July 14, 1962, and has not at any time been set aside or modified, except with respect to Section I thereof which is not relevant herein.

6. Bon Ton, Inc. of Missoula, hereinafter referred to as Bon Ton, was formerly a bakery company or concern with its office, production and distribution plant located at Missoula, Montana. For many years prior to June, 1965 Bon Ton engaged in the production of Bon Ton labelled bread and bread-type rolls and the wholesale distribution and sale of these and other products in certain markets and areas of western Montana. Annual sales for this company exceeded $600,000 in 1963 and in 1964.

7. Beginning on or about May 10, 1965 and for approximately one year thereafter, defendant entered into a series of agreements, understandings or arrangements with Bon Ton and its president and sole owner, a Mr. Alexander Stepanzoff, which resulted in defendant's acquiring, directly or indirectly, the whole or a part of the assets of Bon Ton's bakery business. Pursuant to the said agreement, understandings or arrangements, Bon Ton discontinued its production of bread and bread-type rolls and defendant, in acquiring certain assets, both tangible and intangible, which related to or were used in connection with Bon Ton's bakery business, distributed and sold its bread and bread-type rolls under the label of defendant to customers and in markets formerly sold and supplied with such Bon Ton products.

8. In its acquisition of Bon Ton's assets, as herein alleged in paragraph 7, defendant did not petition the Commission for modification of Section III of the said order or receive Commission permission for such acquisition.

9. By acquiring the whole or a part of Bon Ton's assets, as herein alleged in paragraph 7, and for failing or refusing to petition the Commission or to receive its permission for such acquisition, as herein alleged in paragraph 8, defendant has each day from May 10, 1965, violated and is continuing to violate the said order.

COUNT II

10. Allegations as contained in paragraphs 1 through 5, inclusive, are repeated and realleged as though fully set forth therein.

11. Wyoming Baking Company, doing business as Bunny Bakery and hereinafter sometimes referred to as Bunny, was formerly a baking company or concern with its office and its production and distribution plant located at Casper, Wyoming. For many years prior to April 19, 1966, Bunny engaged in the production of Bunny labelled bread and bread-type rolls and the wholesale distribution and sale of these and other products in certain parts of Wyoming. Annual sales of Bunny were approximately $1,000,000 in 1964 and in 1965.

12. Beginning on or about April 19, 1966, and for approximately one year thereafter, defendant entered into a series of agreements, understandings or arrangements with Bunny and its president, a Mr. Eugene Sneesby, which resulted in defendant acquiring, directly or indirectly, the whole or a part of the assets of Bunny's bakery business. Pursuant to the said agreements, understandings or arrangements, Bunny discontinued its production or bread and bread-type rolls and defendant, in acquiring certain assets, both tangible and intangible, which related to or were used in connection with Bunny's bakery business, distributed and sold its bread and bread-type rolls under the label of defendant to customers and in markets formerly sold and supplied with such Bunny products.

13. In its acquisition of Bunny's assets, as herein alleged in paragraph 12, defendant did not petition the Commission for modification of Section III of the said

order or receive Commission permission for such acquisition.

14. By acquiring the whole or a part of Bunny's assets, as herein alleged in paragraph 12, and for failing or refusing to petition the Commission or to receive its permission for such acquisition, as herein alleged in paragraph 13, defendant has each day from April 19, 1966, violated and is continuing to violate the said order.

COUNT III

15. Allegations as contained in paragraphs 1 through 5, inclusive, are repeated and realleged as though fully set forth herein.

16. Sheppard Baking Company, hereinafter referred to as Sheppard, was formerly a bakery company or concern with its office and its production and distribution plant located at Durango, Colorado. For many years prior to August, 1966, Sheppard engaged in the production of Sheppard labelled bread and bread-type rolls and the wholesale distribution and sale of these and other products in certain parts of the State of Colorado. Annual sales of this company were approximately $200,000 in 1964 and 1965.

17. Beginning on or about August 30, 1966, and for a period of time thereafter, defendant entered into a series of agreements, understandings or arrangements with Sheppard and its president and majority shareholder, a Mr. Melvin C. Hebert, which resulted in defendant acquiring, directly or indirectly, the whole or a part of the assets of Sheppard's bakery business. Pursuant to the said agreements, understandings or arrangements, Sheppard discontinued its production of bread and bread-type rolls and defendant, in acquiring certain assets, both tangible and intangible, which related to or were used in connection with Sheppard's bakery business, distributed and sold its bread and bread-type rolls under the label of defendant to customers and in markets formerly sold and supplied with such Sheppard products.

18. In its acquisition of Sheppard's assets, as herein alleged in paragraph 17, defendant did not petition the

Commission for modification of Section III of the said order or receive Commission permission for such acquisition.

19. By acquiring the whole or a part of Sheppard, as herein alleged in paragraph 17, and for failing or refusing to petition the Commission or to receive its permission for such acquisition, as herein alleged in paragraph 18, defendant has each day from August 30, 1966, violated and is continuing to violate the said order.

WHEREFORE, PLAINTIFF DEMANDS:

1. That the aforementioned acquisitions by defendant under each Count be adjudged and decreed a violation of the said order of the Federal Trade Commission.

2. That judgment be entered against defendant on each Count in the amount of $1,000 per day per Count from the date of acquisition to the day of filing of this complaint, together with total costs and disbursements of this action.

3. That a permanent injunction be issued commanding the future compliance by the defendant, its officers, employees, agents and representatives, with the said order of the Federal Trade Commission.

4. That the plaintiff be granted such other and further relief as this Court deems just and proper.

Dated this 1st day of December 1970.

JAMES L. TREECE
United States Attorney

By: /s/ Carolyn J. McNeill
CAROLYN J. MCNEILL
Assistant U. S. Attorney
323 U. S. Court House
P. O. Box 1776
Denver, Colorado 80201
Attorney for Plaintiff

Of Counsel:

/s/ J. J. Gercke
JOSEPH J. GERCKE
Federal Trade Commission

/s/ James E. Corkey
JAMES E. CORKEY
Federal Trade Commission

[Caption Omitted]

ANSWER TO AMENDED COMPLAINT

Defendant, ITT Continental Baking Company, answers the amended complaint as defined by plaintiff's answers to interrogatories as follows:

First Defense

The amended complaint fails to state a claim against defendant upon which relief may be granted.

Second Defense

Defendant answers the specific allegations of the amended complaint as follows:

Count I

1. Defendant admits that plaintiff claims that this action is brought under the statutes cited in paragraph 1.
2. Defendant admits that the allegations of paragraph 2 claim jurisdiction under the cited statutes.
3. Defendant admits the allegations of the first, third, and sixth sentences of paragraph 3, and admits the allegations of the fifth sentence except that it lacks knowledge or information sufficient to form a belief as to the truth of the allegation that defendant is one of the largest producers, distributors, and sellers in the United States of "other bakery and food products." Defendant denies the allegations of the second sentence of paragraph 3. The allegations of the fourth sentence require no response.
4. Defendant admits the allegations of paragraph 4.
5. Defendant admits that the said decision and Consent Order of the Commission referred to in paragraph 4 were duly served on Continental by registered mail on or about May 15, 1962, and that said Consent Order is a final order and has been modified in that on several occasions Continental sought and obtained the permission

of the Commission to make an acquisition of assets of the sort covered by the Consent Order.

6. Defendant admits the allegations of paragraph 6.

7. Defendant admits the written agreements alleged in paragraph 7 and identified in answer to Interrogatory 1(d) as Exhibits 1, 2, 3, 6; admits the facts set forth in the letters identified in answer to Interrogatory 1(d) as exhibits 4, 5, 7; and admits that it was Continental's understanding, based upon statements made orally by Mr. Stepanzoff, that it was the intention of Bon Ton, Inc. to terminate the production of bread and bread-type rolls before becoming a distributor of Continental's bread products. Wherefore, except as admitted above, defendant denies the allegations of paragraph 7.

8. Defendant admits that with respect to none of the agreements, understandings or arrangements of Continental alleged in paragraph 7 as defined in plaintiff's answers to Interrogatories 1(d) and 1(f) did Continental petition the Commission for modification of Section III of the Consent Order or otherwise receive Commission permission. Defendant denies the remaining allegations of paragraph 8.

9. Defendant denies the allegations of paragraph 9.

Count II

10. Defendant repeats and realleges its responses to paragraphs 1 through 5 inclusive.

11. Defendant admits the allegations of paragraph 11.

12. Defendant admits the written agreements alleged in this paragraph and identified in answer to Interrogatory 2(d) as Exhibits 8, 12, 13, 14, 15, 16; admits the facts set forth in the letters identified in answer to Interrogatory 2(d) as Exhibits 9, 10 and 11; admits the authenticity of the documents identified in answer to Interrogatory 2(d) as Exhibits 17 and 18; and admits that it was Continental's understanding, based upon oral statements made by Mr. Sneesby, that it was the intention of Wyoming Baking Company to terminate the production of bread and bread-type rolls before becoming a distributor of Continental's bread products. Defendant

states that it is without knowledge or information sufficient to form a belief as to whether or not Herbert Van Wyk and Eugene Sneesby formed the oral agreements, understandings or arrangements alleged in paragraph 12 as that paragraph has been defined in plaintiff's further answer to Interrogatory 2, and affirmatively alleges and avers that Van Wyk had no authority to make on behalf of Continental the agreements, understandings or arrangements specified in paragraphs (1), (2), and (5) of plaintiff's further answer to Interrogatory 2, and further alleges and avers that Continental never performed pursuant to any such agreements, understandings or arrangements. Defendant admits the oral arrangement specified in paragraph (3) of plaintiff's further answer to Interrogatory 2 and affirmatively alleges and avers that the Commission was notified of the possibility of said arrangement prior to any performance by Continental pursuant thereto and refused to inform Continental that it regarded such arrangements to be in violation of the Consent Order. Wherefore, except as admitted above, defendant denies the allegations of paragraph 12.

13. Defendant admits that in connection with none of the agreements, understandings or arrangements alleged in paragraph 12 as defined in plaintiff's answers to Interrogatories 2(d) and 2(f) and further answers to Interrogatory 2 did Continental petition the Commission for modification of Section III of the Consent Order or otherwise receive Commission permission for such acquisition. Defendant denies the remaining allegations of paragraph 13.

14. Defendant denies the allegations of paragraph 14.

Count III

15. Defendant repeats and realleges its responses to paragraphs 1 through 5 inclusive.

16. Defendant admits the allegations of paragraph 16.

17. Defendant admits the written agreement alleged in this paragraph and identified in answer to Interrogatory 3(d) as Exhibit 19, admits the authenticity of the documents specified in answer to Interrogatory 3(d) and

identified as Exhibits 20 and 21; and admits that it was Continental's understanding, based on oral statements made by Mr. Hebert, that it was the intention of Sheppard Baking Company to terminate the production of bread and bread-type rolls before becoming a distributor of Continental's bread products. Defendant states that it is without knowledge or information sufficient to form a belief as to whether or not Herbert Van Wyk and Melvin C. Hebert formed the oral agreements, understandings or arrangements alleged in paragraph 12 as that paragraph has been defined in plaintiff's further answer to Interrogatory 2, and affirmatively alleges and avers that Van Wyk had no authority to make on behalf of Continental the agreements, understandings or arrangements specified in paragraph (1) of the further answer to Interrogatory 2, and further alleges and avers that Continental never performed pursuant to any such agreement, understanding or arrangement. Wherefore, except as admitted above, defendant denies the allegations of paragraph 17.

18. Defendant admits that with respect to none of the agreements, understandings or arrangements of Continental alleged in paragraph 17 as defined in plaintiff's answer to Interrogatory 3(d) and 3(f) and further answers to Interrogatory 3 did Continental petition the Commission for modification of Section III of the Consent Order or otherwise receive Commission permission. Defendant denies the remaining allegations of paragraph 18.

19. Defendant denies the allegations of paragraph 19.

Third Defense

Under the rules of the Federal Trade Commission, the applicable statutes, and the Constitution, the failure of the Federal Trade Commission to notify defendant or Continental of its determination that there was a violation of the Consent Order and its failure to take any action for over eighteen months bars recovery of any penalties.

Fourth Defense

Defendant denies liability for any acts or omissions after September 13, 1968, for the reason that on that date the only party to the Consent Order of the Federal Trade Commission ceased to exist and defendant is not bound by that Consent Order.

Fifth Defense

This Court lacks jurisdiction for the reason that the amended complaint fails to allege that the Federal Trade Commission certified the facts to the Attorney General as is required before a penalty action may be commenced. 15 U.S.C. §§ 45, 56.

Sixth Defense

This Court lacks authority to award the injunctive relief requested in the amended complaint.

WHEREFORE, defendant prays that the Court enter judgment in its favor dismissing the amended complaint with costs and such other relief as to the Court may seem just.

/s/ Robert F. Welborn
ROBERT F. WELBORN
WELBORN, COOK, PHIPPS & BROWN
1700 Broadway, Suite 1100
Denver, Colorado 80202

Of Counsel:

JOHN H. SCHAFER
GERALD P. NORTON
COVINGTON & BURLING
888 - 16th Street, N. W.
Washington, D. C. 20006

[Caption Omitted]

PRETRIAL ORDER

The Court, having been advised by the parties that a stipulation of fact can be submitted to the Court which will make unnecessary any trial or other hearing for the taking of evidence on the issues other than relief and that these issues may be decided on the basis of said stipulation of fact and the briefs and oral arguments of the parties, it is hereby Ordered:

1. Jurisdiction of the Court is admitted.

2. The parties are, coincident with the entry of this pretrial order and with the approval of the Court, submitting an amended complaint and an answer to the amended complaint.

3. The plaintiff's claims with respect to each of the three counts are that:

(a) Defendant entered into a series of transactions with companies engaged in the production and sale of bread and bread type rolls which resulted in the acquisition by Continental of assets of these companies.

(b) Defendant acquired the assets in question without seeking or obtaining the prior approval of the Commission as required by the Commission's consent order of May 11, 1962.

(c) Defendant acquired and enjoyed the benefit of the assets and continued to hold and enjoy the benefit of many of the assets so acquired as of the date of the filing of the complaint.

(d) Defendant, through the acquisition of the assets in question, insured the extinguishment of three more companies from the list of independent producers and distributors of bread and bread type rolls. Continental extended its own operations and significantly reduced actual or potential competition in the production and sale of bread and bread type rolls.

(e) Maximum penalties requested by the complaint should be assessed against ITT Continental Baking Company for the violation of the Commission's Order; and that ITT Continental Baking Company should be required within a period of ninety (90) days to dispose of any interest it may have in the Missoula, Montana; Casper, Wyoming; and Durango, Colorado markets, including rights under distributorship and sales agreements, and be precluded from competing in the sale and distribution of bread and bread type rolls in those markets for a period of five (5) years.

4. Defendant denies that it or Continental has made any acquisition in violation of the Commission consent order and as to each count, if any, under which a violation of the consent order is found, defendant claims the remaining issues are:

(a) Whether the violation was through continuing failure or neglect to obey the order;

(b) Whether defendant is liable for any acts or omissions occurring after September 13, 1968, at which time Continental was merged into ITT Continental;

(c) Whether any penalties can be recovered with respect to the period of time after the Federal Trade Commission concluded its investigation of the transactions and prior to its notification to Continental or to ITT Continental that the Commission believed a violation of the order had occurred or was occurring;

(d) Whether the Court is authorized to award the injunctive and/or divesture relief requested by the plaintiff and, if so, what that relief should be;

(e) The proper monetary penalty, if any, which should be assessed.

5. The parties will file with the Court, on or before December 1, 1970, a Stipulation of Fact and no facts other than those contained in said stipulation, and the exhibits and other documents referenced therein, will be received by the Court in evidence. The parties recognize

that the Court may, in its discretion, permit or require additional evidence on the issues of amount of penalty, and other relief, if appropriate.

6. On or before January 4, 1971, the plaintiff shall file its brief in support of its complaint allegations.

7. On or before February 15, 1971, defendant shall file its brief in response.

8. On or before March 1, 1971, plaintiff shall file, if it desires, a reply to the defendant's brief.

9. Oral argument shall be heard on a date to be fixed by the Court.

/s/ Hatfield Chilson
Judge

December 1, 1970.

Approved:

/s/ Carolyn J. McNeill
Attorney for Plaintiff

/s/ Thomas S. Brown
Attorney for Defendant

[Caption Omitted]

STIPULATION OF FACT BY PARTIES

It is hereby stipulated and agreed by and between the undersigned attorneys for plaintiff and defendant, respectively, that the following facts are submitted and agreed upon by the parties and shall be taken as true without any further evidence being produced thereon.

It is further stipulated and agreed that the exhibits attached hereto and made a part hereof are authentic.

It is further stipulated and agreed that insofar as the substantive issue of violation of the Commission's order is concerned the record in this case shall include this stipulation and attached exhibits, the amended complaint, the amended answer, the plaintiff's answers to defendant's interrogatories, the transcripts of the testimony of Eugene Sneesby and Melvin Hebert given in Federal Trade Commission investigational hearings, and the depositions of Eugene Sneesby and Melvin Hebert.

It is also agreed that the stipulation of any fact, or of the authenticity of any document, shall not be construed as an admission by either party of the relevance, materiality, weight, significance or admissibility of that fact or document.

This stipulation is made for the purpose of expeditious resolution of this case only and is not intended by the parties to constitute, and does not constitute, an admission of fact or law in any other matter, dispute or proceeding.

The citations to the exhibits in the narrative portion of this stipulation are intended solely as a convenience to the Court.[1] It is not intended that significance of any exhibit is to be deemed limited in any way by such citation. Failure to cite any exhibit or portion thereof does not limit the right of either party to cite such exhibit or portion thereof in its briefs.

---

[1] The designation S.E. (*i.e.*, Stipulation Exhibit) is used to identify the exhibits attached to and made a part of this stipulation.

Background Facts

1. Defendant[2] is one of the largest producers, distributors and sellers in the United States of bread and bread-type rolls and of other bakery products. It is a corporation engaged in commerce, as commerce is defined in Section 1 of the Clayton Act (38 Stat. 730; 15 U.S. C.A., Sec. 12) and Section 4 of the Federal Trade Commission Act, (52 Stat. 111; 15 U.S.C.A., Sec. 44) in manufacturing, distributing, and selling bakery products to retail stores, institutions and other organizations located throughout the United States. During 1966, defendant had net sales of $588,542,830, of which approximately $300,000,000 was accounted for by the sale of bread and bread-type rolls.[3]

2. For the purpose of this stipulation, the definition of bread and bread-type rolls shall be that used by the Bureau of the Census as set forth in the Census of Manufacturers category S.I.C. 20511. The Bureau of the Census classifies bread and bread-type rolls in a category separate and distinct from all other bakery products, S.I.C. 20511. For purposes of this case bread and bread-type rolls are a separate and distinct line of commerce. They contain different ingredients and require different machinery and personnel for make up and baking than do cake and sweet goods.

3. Because of the nature of the goods produced, the distribution and sales operations of a baking plant are regional in nature. The distribution of bread and related products is limited by the distance they can be eco-

---

[2] As used in this stipulation the term "defendant" refers to Continental Baking Company when the reference is to a date prior to September 13, 1968 and to ITT Continental Baking Company after that date.

[3] As to general nature, size and scope of operations of Continental Baking Company and ITT Continental Baking Company, see Continental Baking Company Annual Report, 1966 (S.E. 1); and Prospectus, ITT Continental Baking Company of June 25, 1970 (S.E. 2, pp. 1, 5-7, of original). *See also* Notice of Special Meeting of Stockholders, dated August 6, 1968 (S.E. 3, pp. 1, 31-34, of original).

nomically shipped from the plant while retaining their freshness.

4. In this line of business, a "route" has some special significance in that deliveries from a distribution plant will follow a prescribed route or geographical pattern. The customers on the route are serviced regularly. The driver of the truck or routeman services established customers and tries to obtain new ones. This driver, routeman or salesman is generally paid a commission on the sales made, in addition to a guaranteed salary. His stops include the stores, restaurants, institutions, etc., located on the route that he follows. At some stops he delivers on credit, at others only on a C.O.D. basis.

5. Route books and customers lists are assets of any person, firm or corporation engaged in the distribution and sale of bakery products.

Prior Federal Trade Commission Proceedings

6. On May 5, 1960, the Federal Trade Commission ("Commission") issued a complaint (S.E. 4) *In The Matter of Continental Baking Company*, Docket No. 7880, charging that Continental Baking Company ("Continental") had violated Section 7 of the amended Clayton Act (64 Stat. 1125; 15 U.S.C.A., Sec. 18) in connection with its acquisition of Omar, Inc., and Rochester Bread Company in November 1958, Braun Baking Company in December 1958 and a variety of other companies during the period 1952 through 1958, all of which were producers and sellers of bread and bread-type rolls. The complaint also charged Continental with violation of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C.A., Sec. 45) by an alleged continuous practice of acquiring various baking concerns throughout the United States.

7. After extensive administrative proceedings, counsel for Continental and Commission counsel negotiated a mutually acceptable "Agreement Containing Consent Order to Divest and to Cease and Desist" (S.E. 5).

8. This "Agreement Containing Consent Order to Divest and to Cease and Desist" was adopted by the Hearing Examiner in issuing his initial decision and order on April 2, 1962 (S.E. 6), and the Hearing Examiner's initial decision and order were adopted by the Commission and issued as its decision and order on May 11, 1962 (S.E. 7).

9. The Commission's decision and order ("consent order") were duly served on Continental by registered mail on May 15, 1962, and became final under the provisions of 15 U.S.C. §§ 21(g) and 45(g) by operation of law on July 14, 1962. Section III of the consent order provides:

> "IT IS FURTHER ORDERED, That for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission." (S.E. 6, 7).

Continental's Merger with ITT Continental

10. On June 12, 1968, after protracted arms-length negotiations a Plan and Agreement of Merger ("Agreement") was entered into between Continental, a publicly-held Delaware corporation, International Telephone and Telegraph Corporation ("ITT"), a publicly-held Delaware corporation, and ITT Continental Baking Company ("ITT Continental"), a Delaware corporation which was and is a wholly-owned subsidiary of ITT. (S.E. 3, pp. 1-6, 15-22, 31-34, Annex A 1-20).

11. Pursuant to the Agreement, on September 13, 1968, Continental ceased to exist as a corporation. Since

September 13, 1968 the business previously carried on by Continental, including the production and distribution of bread and bread-type rolls, has been carried on by ITT Continental.

12. Prior to the merger ITT Continental had no assets or employees.

13. The officers of Continental continued to hold their respective positions with ITT Continental immediately after the merger. There have been more changes in management personnel since that time.

14. Immediately after the merger the assets of ITT Continental were the same as the assets of Continental prior to the merger.

15. After the merger ITT Continental continued to operate the same plants and facilities and with the same organization as previously used by Continental. ITT Continental continued to sell and distribute the same products, in the same manner, to the same customers as had previously been done by Continental.

16. At the time of the foregoing merger, no stockholder of Continental owned as much as 4 percent of Continental's common stock, and ITT owned no such stock. At that time, no amount of ITT stock was owned by Continental. Since the merger, and as a result thereof, 100 percent of ITT Continental's common stock has been owned by ITT.

17. Prior to the merger, no officer, director or employee of Continental was affiliated with ITT. At that time Continental's management was responsible to Continental's Board of Directors, of which a majority were also officers of Continental, and Continental's Board of Directors was in turn responsible to the more than 11,000 holders of Continental's more than 4,000,000 shares of stock.

18. At the time of the merger ITT knew of the consent order against Continental. The merger was to no extent whatever entered into or consummated for the purpose of evading the consent order in any way.

19. At the present time, and as a result of the merger, a majority of the directors of ITT Continental are officers of ITT and were associated with ITT in responsi-

ble positions prior to the merger. ITT Continental's management is thus responsible to a board of directors the majority of which are not officers of ITT Continental, and ITT Continental's board of directors is responsible to a single stockholder, ITT. Three assistant officers of ITT are also assistant officers of ITT Continental.

20. In the Continental "Notice of Special Meeting of Stockholders," dated August 6, 1968 it was stated that "[t]he business conducted by Continental prior to consummation of the transaction [*i.e.*, the merger] will be continued thereafter by New Continental, a new wholly-owned subsidiary of ITT which will be named ITT Contiental Baking Company." (S.E. 3, p. 5.) The Notice also stated that "New Continental will assume all the liabilities of Continental." (S.E. 3, p. 4.)

Continental's Compliance With The Consent Order

21. Since the effective date of the consent order Continental and ITT Continental from time to time have re quested approval of the Commission to make various asset acquisitions from companies engaged in the production and sale of bread and bread-type rolls (S.E. 8-17). In some instances approval was granted (S.E. 8A, 9A, 10A, 12A, 13A, 14A, 15A, 17A) and in other instances denied (S.E. 11A, 16A).

22. Since the effective date of the consent order Continental and ITT Continental have taken all actions required of them under the provisions of the consent order other than Section III.

23. During the time that Section III of the consent order was operative Continental entered into certain transactions without obtaining permission of the Commission or otherwise seeking any modification of Section III of the consent order, which permission or modification plaintiff claims was required. These transactions are the subject matter of Counts I, II and III of the complaint and involve Bon Ton, Inc., of Missoula, Montana; Wyoming Baking Company (d/b/a Bunny Bakery) of Casper, Wyoming; and Sheppard Baking Company of Durango, Colorado, respectively.

Count I

24. Bon Ton, Inc. (hereinafter sometimes referred to as "Bon Ton") was at all times pertinent to this proceeding a Montana corporation with its principal office and place of business in Missoula, Montana.

25. At all times pertinent hereto the corporate stock of Bon Ton was owned, except for certain qualifying shares, by Mr. Alexander Stepanzoff, its president. He controlled the policies of the company and was in sole charge of its operations. All actions by Stepanzoff referred to herein were for and on behalf of Bon Ton.

26. For many years prior to July 12, 1965, Bon Ton had been engaged in the production and sale of bakery products, including bread and bread-type rolls.

27. The bakery products produced by Bon Ton, including bread and bread-type rolls, were sold by it at wholesale to a variety of customers over some thirteen routes located in the western Montana area. Four of these routes were in and around Missoula, three in and around Kalespill, and one each in and around Hamilton, Polson, Plains, Deer Lodge, Anaconda and Philipsburg.

28. Prior to July 12, 1965, Continental had no distribution of bread and bread-type rolls in the western Montana area served by Bon Ton.

29. In addition to the bread and bread-type rolls which it produced, Bon Ton had for many years also sold and distributed to its customers on its several routes cake products produced by Continental under Continental's "Hostess" trade name. (S.E. 18, 18A).[4]

30. Bon Ton had total annual sales of $653,892.12 in 1963 and $613,174.17 in 1964. About 76 percent of such sales were of bread and bread-type rolls.

31. In 1964 Bon Ton's President, Alexander Stepanzoff, approached Continental's Spokane plant manager, Mr. W. C. Noorda, concerning the possibility of the sale of Bon Ton to Continental. Stepanzoff was then in his early

---

[4] S.E. 18 is a letter dated April 10, 1967 from Roy M. Anderson, Vice-President and General Counsel of Continental Baking Company, to Carl J. Batter, Jr., Attorney, Compliance Division, Federal Trade Commission. S.E. 18A-18G are enclosures of S.E. 18.

sixties, had had various medical problems in 1962 and 1963, and his family was urging him to get out of the bakery business. Stepanzoff faced a shortage of competent personnel, particularly in a supervisory capacity, and Bon Ton had sustained its first operating loss in 1964 (S.E. 18, 18F).

32. Noorda advised Stepanzoff that Continental could not purchase Bon Ton because of the outstanding Commission consent order (S.E. 18).

33. In the course of further discussions Stepanzoff suggested working out a bread distributorship,[5] and Continental agreed it would sell to Bon Ton its requirements of Continental's bread and bread-type rolls for resale as a distributor of these products. Stepanzoff had been a distributor of Continental's cake products for years, and felt that he had fewer problems as a distributor than as a producer and distributor of his own products (S.E. 18F).

34. A "Sales Agreement" (S.E. 18B) was entered into between Continental and Bon Ton in May 1965. This agreement provided that Continental would sell and Bon Ton would buy for resale Continental's bread and bread-type rolls and provided for the establishment of Bon Ton as a distributor of these products. It was Continental's and Bon Ton's understanding that Bon Ton would cease production of bread and bread-type rolls before it became a distributor of Continental's bread and bread-type rolls.

35. It was also Continental's and Bon Ton's understanding that initially most of the bread and bread-type rolls produced by Continental for the Bon Ton distributorship would carry Bon Ton labels and be sold and distributed by Bon Ton over the routes and to the customers it had served while in production, and that eventually the Bon Ton labeled bread and bread-type rolls

[5] The term "distributor" and "distributorship" are used throughout this stipulation interchangeably with the words "dealer" and "dealership". The nature of a dealer's or distributor's operations is outlined in the agreements between Continental and Bon Ton, Wyoming and Sheppard Baking (S.E. 18B, 22, 30).

would be phased out and replaced by Continental labeled bread and bread-type rolls.

36. Under the terms of the sales agreement Bon Ton was given an exclusive dealership in the territory in western Montana it had been serving.

37. Additionally, under the sales agreement Stepanzoff was required to sell in the territory allotted to him (which was the area previously served by Bon Ton) only those products carried by Continental in its line and to purchase all of his requirements of such products from Continental. To sell any other products Stepanzoff had to obtain prior written approval from Continental (S.E. 18B). No requests for such approval were made or denied.

38. The sales agreement which established the distributorship also contained a covenant on the part of Stepanzoff that in event of the termination of the agreement he would not compete with Continental or with another dealer of Continental in the sale of products similar to those covered by the agreement and in the territory covered by the agreement for a period of five years (S.E. 18B).

39. The sales agreement also provided Continental with an option to purchase the dealership at a price of $37,500 in the event of Stepanzoff's death or termination of the agreement pursuant to the provisions for renewal (S.E. 18B). The agreement was never terminated pursuant to the provisions for renewal.

40. The sales agreement was signed in May 1965 and was put into effect on the weekend of July 10th, 1965.

41. On July 10th Bon Ton terminated its production of bread and bread-type rolls and on the following Monday, July 12, 1965, began to function as a distributor of bread and bread-type rolls produced by Continental.

42. At the time of the changeover Bon Ton had an inventory of Bon Ton labeled packaging material. This material was transferred to Continental's Spokane plant and for a period of time beginning on July 12, 1965, Continental supplied the distributorship with certain bakery products, including bread and bread-type rolls wrapped in this packaging material carrying the Bon Ton labels

and trademark. These labels and the trademark had been used by Bon Ton when it was in production and were owned and controlled by it. The Bon Ton labeled products were phased out after a period of time and thereafter almost all bakery products sold to this distributor carried Continental labels. To a very limited extent Continental supplied this distributorship with products produced by others.

43. After July 12, 1965, Bon Ton sold and distributed the products produced at or obtained from Continental's Spokane, Washington plant over the same routes and to the same customers and in substantially the same quantities it had sold and distributed similar products produced at its own plant prior to that date.

44. On July 12, 1965, Stepanzoff deposited in the Bon Ton bakery account with the Western Building and Loan Association in Missoula, Montana, a Continental check drawn in his favor in the amount of $37,500. The check was dated June 5, 1965 (S.E. 19, 19C).[6]

45. This $37,500 has been described by Continental and Stepanzoff as a non-interest bearing loan which Stepanzoff needed to meet Continental's credit requirements. Stepanzoff stated that Continental insisted on some security for the advance of $37,500 and accordingly Stepanzoff gave an option to purchase the distributorship for $37,500, which he considered to be its then fair market value (S.E. 18F, 19).

46. Early in 1966 Bon Ton was confronted with the prospect of a competitive disadvantage with respect to his principal competitor, Eddy Baking Company, because of union demands for a five-day week. Eddy operated on a six-day basis, and Continental's plant in Spokane operated on a five-day basis. A five-day week would compel Bon Ton to distribute two-day old bread on one day each week (S.E. 18F).

---

[6] S.E. 19 is a letter dated June 27, 1967, from Roy M. Anderson of Continental Baking Company to Carl J. Batter, Jr., Compliance Division, Federal Trade Commission, in reply to a Commission letter requesting additional information regarding the Bon Ton Bakery of Missoula, Montana. S.E. 19A-19C are enclosures of S.E. 19.

47. On March 1, 1966, Stepanzoff was hospitalized with a possible second heart attack and his family insisted that he get out of the distributorship (S.E. 18F).

48. Early in March 1966 Stepanzoff contacted Continental's Spokane Bakery Manager requesting that Continental buy Bon Ton's trucks and take Bon Ton's drivers on Continental's payroll. Pursuant to agreements dated March 16, 1966 (S.E. 18C, 18D, 19, 20), Continental acquired Bon Ton's accounts receivable, route books, customer lists, trademarks, trucks, and all but approximately $1,800 of its bank account. At this time Mr. Stepanzoff and Bon Ton's drivers became employees of Continental. Stepanzoff became an employee of Continental at a salary of $200 per week (S.E. 18).

49. In consideration of the transfer Continental cancelled all outstanding invoices for products sold to Bon Ton. It also cancelled Stepanzoff's debt of $37,500 which was incurred when he received Continental's check of June 5, 1965, in that amount (S.E. 18).

Count II

50. The Wyoming Baking Company (d/b/a Bunny Bakery) (hereinafter referred to as "Wyoming Baking") was at all times pertinent to this proceeding a Wyoming corporation with its principal office and place of business in Casper, Wyoming.

51. In 1966 the corporation was owned, except for certain qualifying shares, by its president, Mr. Eugene Sneesby. He controlled the policies of the company and was in sole charge of its operations.

52. For a number of years prior to April 19, 1966, Wyoming Baking had been engaged in the production and sale of bakery products, including bread and bread-type rolls.

53. The bakery products produced by Wyoming Baking, including its bread and bread-type rolls, were sold by it to a variety of customers over some 17 routes in Wyoming. These routes were in or near Casper, Riverton, Rawlins, Sheridan, Edgerton, Thermopolis, Douglas, Midwest, Landes, Buffalo and Glenrock.

54. For many years prior to 1966, Wyoming Baking also sold and distributed to the customers on its several routes Continental's Hostess-labelled cake products and at least one bread variety produced by Continental and bearing Continental's Wonder label.

55. During 1964, Wyoming Baking had total sales of approximately $1,004,807 and during 1965 total sales of $968,134. Bread and bread-type rolls accounted for about 70 percent of the 1964 and 1965 total sales.

56. As a distributor of Continental's Hostess cakes Sneesby had occasion to be in contact from time to time with Mr. Herbert Van Wyk, manager of Continental's Denver plant. At a meeting between the two in November 1965, Van Wyk suggested that Wyoming Baking might terminate its production of bread, bread-type rolls and other bakery products and become a distributor of Continental's entire line. Sneesby was not interested in becoming a distributor of Continental's bread, however, and felt that if Continental was interested in the territory he served they would either have to buy him out or run him out.

57. During December 1965 and January 1966 Van Wyk and Sneesby discussed further the possibility of Wyoming Baking's discontinuing production and becoming a distributor of Continental's entire line. At this time Van Wyk told Sneesby that Continental was not in a position to buy a bakery producing bread and bread-type rolls but it could buy the routes of such a bakery if there was no production connected with them. Sneesby has testified that he was unwilling to limit his profit potential by discontinuing production without receiving some money for his routes. Sneesby had a debt of about $80,000 as the remaining balance on the indebtedness he had incurred in modernizing his plant a few years before. While he was not being pressed for payment and said he was not obliged to meet any current loan payments, he felt almost $100,000 would be necessary to pay off his debt. Sneesby had a cash balance in the bank of approximately $130,000 at this time (S.E. 20, p. 57).

58. The discussion between Van Wyk and Sneesby during December 1965 and January 1966 progressed to such

an extent that in February 1966 Van Wyk forwarded to Mr. Gordon Thomas, one of Continental's attorneys, a copy of an "Outline" relating to Bunny Bakery (Wyoming Baking) which contained a detailed plan prepared by Van Wyk for taking over Sneesby's operation. (S.E. 20, pp. 136-140).[7] This plan included provision for purchase at cost of all of Sneesby's inventory, for two loans to Sneesby, each of $50,000, and for the outright purchase by Continental of Sneesby's business after about sixty days of its operation as a distributorship with a covenant by Sneesby not to compete for five years thereafter. On Mr. Thomas' copy of Van Wyk's plan there is marked "No" opposite the proposal re inventory; "No" opposite the proposal for two interest free loans; "Absolutely out" opposite the proposal for acquisition of Sneesby's operation; and "No" opposite the proposal for a covenant not to compete (S.E. 20, p. 140). If called to testify Mr. Thomas would state that these margin notes were made by him at the time of his receipt of Van Wyk's plan.

59. In March of 1966 Thomas, Ralph Ward, Continental's regional vice-president, and Van Wyk, met with Sneesby in Casper to discuss the possibility of an arrangement between Wyoming Baking and Continental.

60. At the meetings in March 1966, the parties discussed the terms of a proposed sales agreement pursuant to which Continental would sell and Wyoming Baking would buy for resale Continental's bread and bread-type rolls. Those present at the meetings are uncertain as to the details of the discussions but Thomas and Sneesby agree that Thomas told Sneesby that Continental could not buy any part of the stock and assets of Wyoming

[7] S.E. 20 is the file of Gordon Thomas relating to the Wyoming Baking Company transactions. During the period of time covered by this file Gordon Thomas was Associate Counsel of Continental Baking. S.E. 21 is the file of O.D. Stevens, Credit Manager of Continental Baking Company relating to transactions with Wyoming Baking. These files have been paginated for purposes of more ready reference.

Baking. (Sneesby, I.H., p. 71) [8] Ward, Sneesby and Van Wyk agree that there was a discussion of the transfer to Continental of Wyoming Baking's inventory of wrapping supplies for future sales of Bunny-labeled products to the distributorship. Neither Ward nor Thomas recall any discussion of a loan to Sneesby and Sneesby himself has no recollection of such a discussion. All parties agree that Thomas was to draft a sales agreement for presentation to Sneesby and Thomas made some notes at the time on the subjects to be covered (S.E. 20, pp. 120-121).

61. Using the notes made at the March meetings and following to some extent the form used in the Bon Ton sales agreement, Thomas drafted a sales agreement which on April 4, 1966 was sent to Van Wyk for consideration and possible presentation to Sneesby (S.E. 20, p. 122-131, 107-120, 104-107).

62. The sales agreement drafted by Thomas was slightly altered by Van Wyk (S.E. 20, p. 106). Thomas approved these alterations and the sales agreement was then presented to Sneesby and executed by him on April 19, 1966 (S.E. 22). Thereafter it was executed on behalf of Continental in New York by Mr. Whammond, Treasurer (S.E. 20, pp. 92-103).

63. The sales agreement reflected the understanding of Continental and Wyoming Baking that Wyoming Baking would discontinue production of bakery products, including bread and bread-type rolls, and become a full line distributor of Continental's products. Performance was to be consummated as soon as possible after execution and in any event within sixty (60) days of the contract date (S.E. 22).

64. The sales agreement provided Wyoming Baking with an exclusive distributorship in those parts of Wyoming Baking's territory where Continental had not distributed bread and bread-type rolls before April 19, 1966. In one area of south-central Wyoming (Rawlins) which

[8] "I.H." refers to a Commission Investigational Hearing. These hearings are authorized by statute and the rules of the Commission. Notice of these hearings were not given to Continental and such is not required by statute or rule.

was already being served by a Continental distributor, Wyoming Baking was given a non-exclusive distributorship (S.E. 22).

65. The sales agreement also contained a covenant that in event of a termination of the agreement and the exercise by Continental of the option to purchase provided for in the agreement Wyoming Baking would not compete with Continental in the sale of products similar to those covered by the agreement in the territory covered by the agreement for a period of five years (S.E. 22).

66. Additionally, under the sales agreement Wyoming Baking was required to sell in the territory alloted to it (which was the area previously served by Wyoming Baking) only the products carried by Continental in its line and to obtain all of its requirements of such products from Continental. To sell any other products Wyoming Baking had to obtain prior written approval from Continental (S.E. 22). Such approval was never refused and was granted as to one product. (Sneesby, I.H. p. 92.)

67. The sales agreement also provided Continental with an option to purchase the dealership under certain circumstances at a price of $170,000 in the event of Sneesby's death or termination of the agreement pursuant to the provisions for renewal (S.E. 22). Sneesby has testified that this provision was included at his insistence. (Sneesby, I.H. p. 48.) The option was never exercised.

68. If called to testify Sneesby would testify that contemporaneous with the written sales agreement, Van Wyk stated to Sneesby that: (1) Continental would exercise its option to purchase the distributorship within a year or two after the signing of the sales agreement; (2) Continental would make two interest free loans to Sneesby of $50,000 each and that these loans would be set off against the $170,000 option purchase price; (3) Sneesby, in the operation of the distributorship, would earn at least 3 per cent net return on sales (Sneesby, Dep. pp. 13, 14, 19). Sneesby would also testify that Van Wyk did not make these statements in the presence of any other Continental officer or employee. However Sneesby would testify that the statements as to purchases and loan were made in the presence of Mr. Brown, his attorney, and

Mr. Chapin, the secretary of Wyoming Baking (Sneesby, Dep. p. 20; Sneesby, I.H., pp. 68-69). Sneesby would also testify that the guarantee profit discussion was strictly between himself and Van Wyk, and that Van Wyk later denied ever having made such an agreement (Sneesby, I.H., pp. 64, 68-69). Finally, Sneesby has testified that Van Wyk promised to hire Wyoming Baking's production personnel, but that he never did so. (Sneesby, I.H. pp. 58-59.)

69. Wyoming Baking ceased production of bakery products including bread an bread-type rolls on the weekend of June 10, 1966, and on the following Monday, June 13, 1966, commenced distribution of bread, bread-type rolls and other bakery products produced at Continental's Denver plant.

70. On and after June 13, 1966, Wyoming Baking sold and distributed the products produced at Continental's Denver, Colorado plant over the same routes and to the same customers and in substantially the same quantities as it had sold and distributed similar products produced at its own plant prior to that date.

Sneesby has testified that as a distributor of Continental's products Wyoming Baking operated as an independent corporation, and that management, hiring, firing, promotion of business and the like were still his prerogatives (Sneesby, I.H., pp. 13, 86-87).

71. At the time of the changeover Wyoming Baking had an inventory of "Bunny" labeled packaging material (*i.e.*, Wyoming Baking material). This material was transferred to Continental's Denver plant on May 17, 1966 (S.E. 20, p. 75) and for a period of time between June 13, 1966, and September, 1966, Continental supplied the distributorship with certain bakery products, including bread and bread-type rolls wrapped in this packaging material carrying the "Bunny" trademark which had been used by Wyoming Baking when it was in production. After September, 1966, "Bunny" labeled products were gradually phased out and thereafter most bakery products, including bread and bread-type rolls, sold to this distributor carried Continental's labels or were, to a very limited extent, products obtained by

Continental from other producers (and bearing the labels of such other producers) but sold and distributed by Continental to outlets it served such as the distributor Wyoming Baking (S.E. 20, p. 68).

72. To compensate Wyoming Baking for the inventory of "Bunny" packaging used by Continental, a discount off Continental's invoices to Wyoming Baking was allowed during the period after June 13, 1966, until the packaging material was no longer being used by Continental. These discounts amounted to $11,634 (S.E. 20, pp. 39, 75).

73. Also transferred from Wyoming Baking to Continental were: bulk bun cartons for $401.29, and bread pans for $475.00. The bulk bun cartons and bread pans were paid for by a check from Continental for $876.29 (S.E. 20, pp. 16-17). The amount paid for the bread pans was described as "negligible" by Sneesby and a Commission attorney (Sneesby, I.H. p. 81).

74. In regard to Continental's use of and payment for these supplies Van Wyk stated to Ward that Thomas had advised him that there was no legal problem so long as payment was not made until after June 13, 1966, when Wyoming Baking would be out of production (S.E. 20, p. 75).

75. Sometime in July 1966 Sneesby requested of Van Wyk the first $50,000 interest-free loan that Sneesby asserts Van Wyk had promised him at the time of the execution of the sales agreement. Van Wyk checked this request with Thomas in New York, was told there could be no loan to Sneesby, and thereupon informed Sneesby there could be no loan (S.E. 20, p. 64; Sneesby, I.H. 49-51).

76. When the cash loan was turned down Sneesby obtained the use of $50,000 by withholding payment on that amount of purchases, which was about three weeks' worth (Sneesby, I.H. p. 52). Continental's responsible officers—Ward, Thomas, and Mr. Stevens, who was Continental's Credit Manager—had no knowledge of any commitment to grant Sneesby a loan or credit for $50,000 worth of purchases, and they on numerous occasions instructed Van Wyk to bring Sneesby's credit in line

with the ten days' credit provided for in the sales agreement (S.E. 20, pp. 43, 48-51, 54-55; S.E. 21, pp. 5, 10, 12-15). When Sneesby and Van Wyk attempted to get the sales agreement amended to give Sneesby five weeks' credit, Continental's officers refused to sign such an amendment (S.E. 20, pp. 51, 55-62; S.E. 21, pp. 16-21). When Van Wyk wrote Sneesby in effect acquiescing in three weeks' credit he stated that "I certainly do not have approval for this." (S.E. 20, p. 54.)

77. Sneesby wrote Van Wyk on November 11, 1966 asking, inter alia, for an additional $50,000 loan which he was willing to take by way of additional credit if Van Wyk wanted it that way, since loans could not be made, so long as he [Sneesby] had written assurance that Continental would permit him to maintain a debit balance of $100,000 (S.E. 23; 20, p. 45). On November 18, 1966 Van Wyk reviewed this letter with Sneesby at a conference in Casper and stated to him that there could be no further credit allowance (S.E. 20, pp. 46-47). On November 25, 1966 Sneesby's attorney, Brown, wrote Van Wyk protesting Van Wyk's denial of having made several promises to Sneesby and threatening legal action to reform the written contract and for damages (S.E. 20, p. 44).

78. Thomas met with Sneesby and Brown in January 1967. By letter of January 27, 1967 Thomas wrote to Sneesby's attorney covering the various points of their discussion. As to any commitment by Van Wyk that Continental would purchase Sneesby's distributorship, Thomas reported that if such a promise was made it was outside the scope of Van Wyk's authority, and stated that under no circumstances was Continental legally in a position to purchase Sneesby's business. Thomas' letter further recorded a suggestion made by Thomas that Continental might be able to find someone interested in purchasing the distributorship from Sneesby and operating it in the future as an independent economic entity. Thomas stated that if Continental could not find such a purchaser it would apply to the Commission for permission to acquire Sneesby's distributorship (S.E. 20, pp. 34-37).

79. In February of 1967 Messrs. Ralph and Don Wheelwright of Boise, Idaho (doing business as "Wheelwright Brothers" and hereinafter referred to as such) were then distributors of Continental's products in the Boise, Idaho area. They were contacted by Continental's Ogden, Utah, plant manager, Mr. Lyle Worthington, and he informed them of Sneesby's willingness to sell the distributorship.

80. On March 10, 1967, one of Continental's attorneys called at the offices of responsible Commission personnel and reported, in essence, that Continental's present distributor in Casper (Wyoming Baking) wanted to sell out, that Continental had found a possible buyer by the name of Wheelwright, and that if the Wheelwrights did buy, Continental would probably have to guarantee any loans they secured. Continental's attorney stated that he "was not asking for any prior approval" but added that "if you [Commission staff] did have any opinion on the subject" he "would of course be interested to hear them." (S.E. 24A.) The Commission attorneys on the same date advised Continental's attorneys that:

> . . . we are continuing our inquiry, initiated sometime ago, with respect to the arrangements entered into between Continental Baking Company and Mr. Sneesby and Wyoming Baking Company. We accordingly express no opinion as to the legal propriety of any future negotiations as they may relate to the Docket 7880 order. (S.E. 24.)

From that date until the filing of the complaint in this case no one connected with the Commission ever expressed to Continental the opinion that the Wheelwright transaction was in any way unlawful or in violation of the consent order.

81. The Wheelwright Brothers visited Casper and examined Sneesby's plant and business. They decided to acquire the distributorship, and contacted Ward. Ward informed them that Continental had no objections to their purchase of Sneesby's distributorship.

82. In order to effect the purchase the Wheelwright Brothers secured two bank loans. The first, in the

amount of $15,000, was obtained from the First National Bank in Boise, the second, for $110,000, from the Wyoming National Bank of Casper.

83. The Wheelwright Brothers were aware that they would be unable to obtain a loan as large as $100,000 without some additional security. Ward told them that Continental would guarantee the $110,000 note and in fact did so.

84. As of April 1, 1967 the Wyoming Baking distributorship was transferred to the Wheelwright Brothers in consideration of the payment by them to Wyoming Baking of $125,000 (S.E. 25, 26).

85. Another agreement (S.E. 27) was entered into at this time (dated March 28, 1967) between Wyoming Baking and Continental which acknowledged the payment to Continental by Wyoming Baking of the sum of $57,809.23. This sum represented the money Wyoming Baking owed Continental for purchases of merchandise received (Sneesby, I.H. p. 82). Although no interest was charged on any part of this indebtedness, defendant's responsible officials, if called to testify, would state that interest is not customarily charged in settling debts on delinquent accounts.

This agreement also recited a release and discharge on the part of both parties from any and all obligations which had theretofore arisen or might arise under the said contract of April 19, 1966, including any and all oral agreements made between the parties with reference to such contract (S.E. 28).

86. Sneesby realized out of the sale to the Wheelwrights $125,000 less the $57,809.23 paid to Continental for his prior trade purchases. His willingness to take an amount considerably less than the $170,000 purchase price he quoted in early 1966 was explained by Sneesby as being "the best arrangement that I could make and if I made any mistakes in understanding and so forth, maybe this was the way to go on it instead of try to fight it, argue about it, for a great period of time and wonder how it might come out." (Sneesby, I.H. p. 56).

87. On April 3, 1967 the Wheelwright Brothers began operating the distributorship and selling and dis-

tributing Continental labeled products over the routes and to the customers that had been served by Wyoming Baking until April 1, 1967.

88. After about one year, the Wheelwright Brothers found that because of diminishing sales and other problems they were behind in their payments to Continental and financially indebted to the company.

89. The Wheelwright Brothers informed Continental of their desire to get out of the "Casper" business. An agreement was then entered into between Continental and the Wheelwright Brothers as a result of which Continental acquired the Casper distributorship in consideration of the cancellation of the Wheelwright's debts and the payment to them of the $15,000 in cash invested by them in the distributorship at the time of purchase from Sneesby.

Count III

90. The Sheppard Baking Company (hereinafter sometimes referred to as "Sheppard") was at all times pertinent a Colorado corporation with its principal office and place of business in Durango, Colorado.

91. The company was incorporated about 1963. At all times pertinent hereto Mr. Melvin C. Hebert operated the business and owned a majority stock interest in it.

92. For many years prior to August 1966 Sheppard baked bread and bread-type rolls at its Durango plant.

93. The bakery products produced by Sheppard were distributed and sold at wholesale to customers located along four routes in southwestern Colorado. Two of these routes were in and around Durango, Hesperus, and Vallecito; one was in the Cortez area; and one in the Pagosa Spring area.

94. For many years prior to August 1966 Sheppard had also sold and distributed Continental's Hostess-labeled cakes to customers serviced on its routes, as well as cakes and potato chips produced by other companies.

95. For the fiscal year ending June 30, 1965 Sheppard had total sales of $202,706 and for the fiscal year ending June 30, 1966 total sales of $220,057.

96. The sale of bread and bread-type rolls accounted for about 75 per cent of Sheppard's total sales volume.

97. Business difficulties in 1964 and 1965 promoted Hebert to initiate efforts to sell the company. He first approached J. C. Patterson Company and Mead Baking Company, without success in either case.

98. About May 1966 Hebert entered into discussions with Van Wyk about becoming a distributor of Continental's bread and bread-type rolls in addition to its cake products.

99. A sales agreement (S.E. 30) was entered into between Continental and Sheppard in August 1966. This agreement provided that Continental would sell and Sheppard would buy for resale Continental's bread and bread-type rolls and established Sheppard as a distributor of these products. It was Continental's and Sheppard's understanding that Sheppard would cease production of bread and bread-type rolls before it became a distributor of Continental's bread and bread-type rolls.

100. It was also Continental's and Sheppard's understanding that initially most of the bread and bread-type rolls produced by Continental for the Sheppard distributorship would carry Sheppard labels and be sold and distributed by Sheppard over the routes and to the customers it had served while in production, and that eventually the Sheppard labeled bread and bread-type rolls would be phased out and replaced by Continental labeled bread and bread-type rolls.

101. Prior to August 1966 Continental had no distribution of bread and bread-type rolls in the area of Colorado served by Sheppard. Under the terms of the sales agreement Sheppard was given an exclusive dealership in this territory.

102. Under the sales agreement Sheppard was required to sell in the territory alloted to it (which was the area served by Sheppard) only the products carried by Continental in its line and to obtain all its requirements of such products from Continental. To sell any other products the dealer had to obtain prior written approval from Continental (S.E. 30). This approval was never

refused, and was requested with respect to two products and given (S.E. 31; Hebert, Dep. pp. 5-6).

103. Sheppard ceased production of bread and bread-type rolls on a weekend in mid-October, 1966 and on the following Monday commenced distribution of bread and bread-type rolls produced at Continental's Denver plant.

104. After the termination of its production in mid-October, 1966 Sheppard sold and distributed products produced at Continental's Denver plant over the same routes to the same customers and in substantially the same quantities as it had sold and distributed similar products produced at its own plant prior to that date.

105. At the time of the changeover Sheppard had an inventory of Sheppard labeled packaging material. This material was transferred to Continental's Denver plant and for a period of time Continental supplied the distributorship with bread and bread-type rolls wrapped in this packaging material which had been used by Sheppard when it was in production. After a period of time Sheppard labeled products were gradually phased out and thereafter most bread and bread-type rolls sold to this distributor carried Continental's labels.

106. After Sheppard became a distributor of Continental's bread and bread-type rolls the business was operated by Hebert as an independent distributor of Continental products pursuant to the provisions of the sales agreement (S.E. 30). Hebert testified that Continental had nothing to do with any of Sheppard's management decisions and that he believed the company was as independent as it had been prior to June 1966. (Hebert, Dep. pp. 17-18).

Commission Investigation

107. Upon the basis of information brought to its attention by third party and internal sources, the staff of the Commission commenced an investigation in July 1966 involving certain of the operations of Continental as they related to the provisions of the Commission's consent order. This inquiry continued until July 10,

1968, at which time the staff formally reported to the Commission with respect to the results of such investigation and recommended that the Commission certify a civil penalty action to the Attorney General based upon the factual situations set forth in counts 1, 2 and 3 of the present complaint.

As part of the staff's inquiry, Continental was from time to time requested to supply information as reflected in various of the exhibits constituting attachments to the stipulation. The final request for information directed to Continental itself by the Commission's staff was on May 12, 1967 (S.E. 19). Two investigational hearings were conducted, one on May 2, 1967 (Sneesby, I.H.) and one on May 16, 1967 (Hebert, I.H.).

At no time prior to the filing of the complaint did the Commission notify Continental or ITT Continental that it had concluded that Continental's arrangements with Bon Ton, Wyoming Baking or Sheppard violated the Commission's consent order against Continental, nor did it ever advise Continental or ITT Continental that the Commission was of the opinion that Continental or ITT Continental had not complied with that consent order.

108. In April 1966 the Commission staff learned of a transaction between Continental and the Mack Baking Company of Bangor, Maine. The Commission staff made several limited inquiries into the matter, including a letter of inquiry to Continental dated May 24, 1966 (S.E. 34), to which it received a reply in June 1966 (S.E. 34A). The Commission made no decision to challenge the transaction as constituting a violation of the consent order. Continental made no application to the Commission for approval of the transaction nor did the Commission ever express approval or disapproval of the transaction.

Certification to the Attorney General

109. On August 2, 1968, pursuant to the provisions of Section 16 of the Federal Trade Commission Act, the Federal Trade Commission certified to the Attorney

General of the United States the facts constituting its reasons for believing that violations of the consent order had occurred. (S.E. 36.) The Commission recommended that the Atorney General institute appropriate proceedings for the recovery of civil penalties, as provided for in Section 11(1) of the Clayton Act and Section 5(1) of the Federal Trade Commission Act, and certain injunctive relief.

Exhibits

The parties hereto stipulate and agree that the exhibits attached hereto and made a part hereof are authentic, but expressly reserve the right to argue as to the relevancy and materiality of any document or part thereof and as to significance and weight to be attached to any statement therein.

S.E. 1 Continental Baking Company, Annual Report, 1966.

S.E. 2 ITT Continental Baking Company Prospectus, June 25, 1970.

S.E. 3 Continental Baking Company "Notice of Special Meeting to Stockholders", dated August 6, 1968.

S.E. 4 Federal Trade Commission Complaint dated May 5, 1960.

S.E. 5 "Agreement Containing Consent Order to Divest and to Cease and Desist" In The Matter of Continental Baking Company, Docket No. 7880, dated March 28, 1962.

S.E. 6 Initial Decision and Order of Hearing Examiner dated April 2, 1962.

S.E. 7 Decision and Order of Federal Trade Commission dated May 11, 1962.

S.E. 8 Letter, dated December 15, 1965, from Roy M. Anderson, Vice President and General Counsel, Continental Baking Company to Joseph W. Shea, Secretary, Federal Trade Commission.

S.E. 8A Letter, dated May 24, 1966 from Joseph W. Shea, Secretary, Federal Trade Commission, to Roy M. Anderson, Vice President and General Counsel, Continental Baking Company.

S.E. 9 Letter, dated March 30, 1967 from John H. Schafer, Covington & Burling, attorney for Continental Baking Company, to Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.

S.E. 9A Letter, dated April 18, 1967, from Joseph W. Shea, Secretary, Federal Trade Commission, to John H. Schafer, Covington & Burling.

S.E. 10 Letter, dated September 20, 1967, from John H. Schafer, Covington & Burling, to Lars Janson, Attorney, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.

S.E. 10A Letter, dated September 29, 1967, from Joseph W. Shea, Secretary, Federal Trade Commission, to John H. Schafer, Covington & Burling.

S.E. 11 Letter, dated November 24, 1967, from John H. Schafer, Covington & Burling, to Lars Janson, Attorney, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.

S.E. 11A Letter, dated January 2, 1968 from Joseph W. Shea, Secretary, Federal Trade Commission, to John H. Schafer, Covington & Burling.

S.E. 12 Letter, dated May 14, 1968 from Roy M. Anderson, Vice President and General Counsel, Continental Baking Company, to Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.

S.E. 12A Letter, dated June 10, 1968 from Joseph W. Shea, Secretary, Federal Trade Commission to John H. Schafer, Covington & Burling.

S.E. 13 Letter, dated November 4, 1968 from Roy M. Anderson, Vice President and General Counsel, Continental Baking Company, to Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.

S.E. 13A Letter, dated December 23, 1968 from Joseph W. Shea, Secretary, Federal Trade Commission, to Roy M. Anderson, Vice President and General Counsel, Continental Baking Company.

S.E. 14 Letter, dated January 16, 1969 from John H. Schafer, Covington & Burling, to Joseph W. Shea, Secretary, Federal Trade Commission.

S.E. 14A	Letter, dated May 2, 1969 from Joseph W. Shea, Secretary, Federal Trade Commission, to John H. Schafer, Covington & Burling.
S.E. 15	Letter, dated October 17, 1969 from Gordon A. Thomas, Associate Counsel, ITT Continental Baking Company, Inc., to Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.
S.E. 15A	Letter, dated December 24, 1969 from Joseph W. Shea, Secretary, Federal Trade Commission, to Gordon A. Thomas, Associate Counsel, ITT Continental Baking Company.
S.E. 16	Letter, dated November 7, 1969 from Gordon A. Thomas, Associate Counsel, ITT Continental Baking Company, to Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.
S.E. 16A	Letter, dated March 26, 1970, from Joseph W. Shea, Secretary, Federal Trade Commission, to Gordon A. Thomas, Associate Counsel, ITT Continental Baking Company.
S.E. 17	Letter, dated January 30, 1970, from Gordon A. Thomas, Associate Counsel, ITT Continental Baking Company, to Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.
S.E. 17A	Letter, dated April 27, 1970, from Joseph W. Shea, Secretary, Federal Trade Commission, to Gordon A. Thomas, Associate Counsel, ITT Continental Baking Company.
S.E. 18	Letter, dated April 10, 1967 from Roy M. Anderson, Vice President and General Counsel, ITT Continental Baking Company, to Carl J. Batter, Jr., Attorney, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.
S.E. 18A	Continental Baking Co.—Bon Ton, Inc., Hostess Cakes Dealership Agreement, April 23, 1953, submitted as enclosure to Anderson letter of April 10, 1967 (S.E. 18).
S.E. 18B	"Sales Agreement, Independent Dealer" for Wonder Bread, between Continental Baking Company and Alex Stepanzoff, dated May 1965.
S.E. 18C	Indenture of Lease between Continental Baking Company and Bon Ton dated March 16, 1966.

S.E. 18D	Agreement providing for assignment of accounts receivable and labor contract by Bon Ton, Inc., to Continental Baking Company dated March 16, 1966.
S.E. 18E	Memorandum of Agreement made and entered into on March 16, 1966 between Continental and Bon Ton.
S.E. 18F	Letter, dated April 8, 1967 from Alex Stepanzoff to Roy M. Anderson, Vice President and General Counsel, Continental Baking Company.
S.E. 18G	"Schedule 2, Record of Gross Sales by Weeks to Bon Ton * Missoula, Montana, from 7-5-1965 to 3-26-66."
S.E. 19	Letter, dated June 27, 1967 from Roy M. Anderson, Vice President and General Counsel, Continental Baking Company to Carl J. Batter, Jr., Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.
S.E. 19A	Bon Ton, Inc., of Missoula Year-End Report, 1963.
S.E. 19B	Bon Ton, Inc., of Missoula Year-End Report, 1964.
S.E. 19C	Continental Baking Company check dated June 5, 1965 for $37,500 to the order of Alex Stepanzoff.
S.E. 20	File of Gordon A. Thomas, Associate Counsel, ITT Continental Baking Company, relating to the Wyoming Baking Company.
S.E. 21	File of O. D. Stevens, Credit Manager, ITT Continental Baking Company, relating to the Wyoming Baking Company.
S.E. 22	"Sales Agreement, Independent Dealer" dated April 19, 1966 between Continental Baking Company and Wyoming Baking Company.
S.E. 22A	Letter, dated October 18, 1966, from Gordon Thomas, Associate Counsel, Continental Baking Company to Carl J. Batter, Jr., Attorney, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission (with map referred to in S.E. 22).
S.E. 23	Letter, dated November 11, 1966, from Eugene Sneesby, Wyoming Baking Company, to Hebert Van Wyk, manager, of Continental Baking Company's Denver plant.
S.E. 24	Letter, dated March 10, 1967, from Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission to John H. Schafer, Covington & Burling.

S.E. 24A	Letter, dated March 10, 1967, from John H. Schafer, Attorney for Continental Baking Company to Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.
S.E. 25	"Agreement" dated March 28, 1967, between Wyoming Baking Company to Wheelwright Brothers.
S.E. 26	"Bill of Sale," dated April 1, 1967, from Wyoming Baking Company and Wheelwright Brothers.
S.E. 27	Consulting Agreement, dated March 28, 1967, between Eugene Sneesby and the Wheelwright Brothers.
S.E. 28	"Agreement", dated March 28, 1967, between Continental Baking Company and Wyoming Baking.
S.E. 29	Lease Agreement, dated March 28, 1967, between Wyoming Baking Company and Wheelwright Brothers.
S.E. 30	"Sales Agreement, Independent Dealer," dated August 1966, between Continental Baking Company and Sheppard Baking Company.
S.E. 31	Letter, dated September 12, 1966, from Continental Baking Company to Melvin Hebert, Sheppard Baking Company.
S.E. 32	Sheppard Baking Company's balance sheet and profit and loss statement for fiscal years ending June 30, 1964, 1965 and 1966.
S.E. 33	Letter, dated January 3, 1967, from Roy M. Anderson, Vice President and General Counsel, Continental Baking Company, to Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.
S.E. 33A	Letter dated January 11, 1966, from Carl J. Batter, Jr., Attorney, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission, to William J. Whammond, Secretary, Continental Baking Company.
S.E. 34	Letter, dated May 24, 1966, from Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission, to William J. Whammond, Secretary, Continental Baking Company.
S.E. 34A	Letter, dated January 3, 1966, from William J. Whammond, Secretary, Continental Baking Company, to Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.

S.E. 34B Letter, dated June 30, 1966, from Carl J. Batter, Jr., Attorney, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission, to William J. Whammond, Secretary, Continental Baking Company.

S.E. 35 Letter, dated January 3, 1967, from Roy M. Anderson, Vice President and General Counsel, Continental Baking Company, to Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.

S.E. 36 Letter, dated August 2, 1968, from Paul Rand Dixon, Chairman, Federal Trade Commission to Ramsey Clark, Attorney General.

S.E. 36A Letter, dated August 14, 1968, from Edwin M. Zimmerman, Assistant Attorney General, Antitrust Division, to Paul Rand Dixon, Chairman, Federal Trade Commission.

Transcripts of Investigational Hearings

Sneesby, Investigational Hearing (I.H.) —Eugene Sneesby, transcript of investigational hearing, on May 2, 1967. Exhibits from this hearing correspond to the Stipulation Exhibits as follows:

Exhibit 1 — S.E. 27
Exhibit 2 — S.E. 25
Exhibit 3 — S.E. 26
Exhibit 4 — S.E. 28
Exhibit 5 — S.E. 29
Exhibit 6 — S.E. 23

Hebert, Investigational Hearing (I.H.) —Melvin C. Hebert, transcript of investigational hearings, on May 16, 1967. Exhibits from this hearing correspond to the Stipulation Exhibits as follows:

Exhibit A — S.E. 30
Exhibit B — S.E. 31
Exhibit C — S.E. 32
Exhibit D — S.E. 32
Exhibit E — S.E. 32

Interrogatories

Defendants Interrogatories filed April 1, 1969.

Plaintiffs Answers to Interrogatories, filed May 1, 1969.

Plaintiffs Further Answers to Interrogatories, filed April 6, 1970.

Exhibits to Plaintiffs Answers Correspond to the Stipulation Exhibits as Follows:

Exhibit 1 — S.E. 18D
Exhibit 2 — S.E. 18E
Exhibit 3 — S.E. 18C
Exhibit 4 — S.E. 18F
Exhibit 5 — S.E. 18
Exhibit 6 — S.E. 18B
Exhibit 7 — S.E. 19
Exhibit 8 — S.E. 22
Exhibit 9 — S.E. 22A
Exhibit 10 — S.E. 33
Exhibit 11 — S.E. 24A
Exhibit 12 — S.E. 27
Exhibit 13 — S.E. 25
Exhibit 14 — S.E. 26

Sneesby, Deposition (Dep.) —Eugene Sneesby, transcript of deposition, on June 23, 1970. Exhibits from this deposition correspond to the Stipulation Exhibits as follows:

Exhibit 8 — S.E. 22
Exhibit 12 — S.E. 27
Exhibit 13 — S.E. 25
Exhibit 14 — S.E. 26
Exhibit 15 — S.E. 28
Exhibit 16 — S.E. 29
Exhibit 17 — S.E. 23

Hebert, Deposition (Dep.) —Melvin G. Hebert, transcript of deposition, on June 24, 1970. Exhibits from this deposition correspond to the Stipulation Exhibits as follows:

Exhibit 19 — S.E. 30
Exhibit 20 — S.E. 20

R. Wheelwright, Deposition (Dep.)	—Ralph Wheelwright, transcript of deposition, on June 24, 1970.
D. Wheelwright, Deposition (Dep.)	—Don Wheelwr'ght, transcript of deposition, on June 24, 1970.

/s/ James E. Corkey
Of Counsel

/s/ John H. Shafer
Of Counsel

Dated: December 1, 1970
Approved:

Dated: December 1, 1970

/s/ Carolyn J. McNeill
Attorney for Plaintiff

/s/ [Illegible]
Attorney for Defendant

/s/ Hatfield Chilson
HATFIELD CHILSON
U.S. District Judge

STIPULATION EXHIBIT 4

571 0670

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 7880

In the Matter of

CONTINENTAL BAKING COMPANY,
a corporation.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent has violated and is now violating the provisions of Section 7 of the amended Clayton Act (15 U.S.C. Section 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint charging as follows:

COUNT I

PARAGRAPH ONE: Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Rye, New York.

Respondent is engaged in the business of manufacturing, distributing and selling bread and other bakery products. Its products are sold primarily under the trade name of "Wonder" for bread and "Hostess" for cakes. Respondent is the largest commercial baker of white bread, and one of the largest bakers of cake in the United States. Its total sales during the year 1957 exceeded $307,000,000.

Respondent's products are baked by some 86 plants located in approximately 64 cities in 29 states and the District of Columbia, and are distributed by approximately 333 agencies and depots throughout a 44 state

system. The daily production of each bakery of the respondent is distrbuted to grocery stores, restaurants, institutions, and other users, by approximately 5000 driver-salesmen operating light delivery trucks on about 4500 regularly established routes.

PARAGRAPH TWO: Sales of bread and bread-type rolls are made from each of respondent's bread plants throughout an effective area of distribution of several hundred miles from each plant. This radius is governed by the distance each plant can economically ship its products. Within this effective area of distribution, each plant encounters competition from local independent bakers and other plants of national bakers.

For example, typical of the trade areas in which respondent operates is the Omaha, Nebraska, trade area. In this trade area, respondent operates a bakery plant that ships fresh bread and bread-type rolls within its marketing or distributional area. Within this trade area of its Omaha plant, respondent encounters competition in the distribution and sale of bread and bread-type rolls from local independent wholesale bakeries and plants of other competing national bakeries.

PARAGRAPH THREE: In the course and conduct of its business, respondent ships bread and bread-type rolls directly from its bakeries to the purchasers thereof, some of whom are located in states other than those from which such shipments originate. Further, respondent ships bread and bread-type rolls from its bakery to sales depots or loading stations some of which are located in states other than those from which such shipments originate, for the purpose of having such products re-shipped to its purchasers, some of whom are located in states other than those from which re-shipments are made.

Further, in the course and conduct of its business, respondent carries on negotiations across state lines with some of its customers for the sale of its products. As part of such negotiations, adjustments of accounts between respondent and some of its customers regularly take place across state lines.

Advertising of respondent's products, on both a national and local scale, is prepared and placed in various advertising media by respondent, or under its direction and control, from its headquarters at Rye, New York.

In the regular course and conduct of its business from its headquarters, respondent purchases various raw materials for the manufacture of its products as well as supplies, equipment and other needs for such manufacture and ships or causes to be shipped such items to its bakeries located in states other than those from which such shipments originated.

In the regular course and conduct of its business respondent maintains and controls, either directly from its headquarters or through its regional offices, activities of its bakeries located in the various states of the United States, such as:

1. The areas in which, and the prices at which, each bakery sells respondent's products;
2. The standard of production of all of its bakeries;
3. The nature and extent of most repairs to plants and equipment;
4. Personnel policies; and
5. Funds to be collected and dispersed by said bakeries.

In the exercise of such controls, there is maintained across state lines a steady flow of correspondence and other contacts between and among respondent's headquarters, regional offices, bakeries and sales depots.

By these methods, respondent maintains a course of trade in commerce, as "commerce" is defined in the amended Clayton Act and in the Federal Trade Commission Act, in bread and other bakery products, among and between the various states of the United States.

PARAGRAPH FOUR: Prior to the acquisition alleged herein, Omar, Inc., was a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 1910 Harney Street, Omaha, Nebraska.

It was engaged in the manufacture, distribution and sale of bread and other bakery products, from plants

located at Omaha, Nebraska; Indianapolis, Indiana; Milwaukee, Wisconsin; and Columbus, Ohio. These products were shipped from the plants mentioned via trucks to approximately 50 branches or depots for further distribution throughout some 1500 routes in the States of Illinois, Indiana, Iowa, Wisconsin, Nebraska, and portions of the States of Missouri, Kentucky and West Virginia.

Total sales of Omar, Inc., during the year 1957 were approximately $40,000,000, which volume placed it among the ten largest commercial bakers in the United States.

PARAGRAPH FIVE: In the course and conduct of its business, Omar, Inc., shipped bread and bread-type rolls from its various bakery plants directly to its purchasers, some of whom were located in states other than those from which such shipments originated. It also shipped its products from its bakeries to sales depots or loading stations, some of which were located in states other than those in which such shipments originated, for regular reshipment to purchasers, some of whom were located in states other than those from which such reshipments were made.

Omar, Inc., carried on negotiations across state lines with some of its customers for the sale of its products, as well as for the adjustment of accounts between it and its customers.

Advertising of its products was prepared and placed in various advertising media by Omar, Inc., or under its direction and control, from its headquarters in Omaha, Nebraska.

In the regular course and conduct of its business from its headquarters, Omar purchased raw material for the manufacture of its products, as well as supplies, equipment and other needs, and shipped or caused to be shipped such items to its bakeries located in states other than those from which such shipments originated.

In the course and conduct of its business, Omar, Inc., maintained control over various activities of its different bakeries such as, for example:

1. The areas in which, and prices at which, each bakery was permitted to sell;

2. Standards of products to be maintained by said bakery;
3. The nature and extent of most repairs to plants and equipment;
4. Personnel policies; and
5. Funds to be collected and dispersed.

In the exercise of such controls, Omar, Inc., maintained across state lines a steady flow of correspondence and other contacts between and among its headquarters and its bakeries.

By such means, Omar, Inc., maintained a course of trade in commerce, as "commerce" is defined in the amended Clayton Act and in the Federal Trade Commission Act, in bread and other bakery products among and between the various states of the United States.

PARAGRAPH SIX: Since 1952 respondent has entered into a continuous practice of acquiring various bakeries throughout the United States, many of which, prior to their acquisition by respondent, had competed with respondent within the marketing areas of the acquired companies, and all of which prior to their acquisition by respondent were engaged in commerce, as "commerce" is defined in the amended Clayton Act and the Federal Trade Commission Act.

In 1952 respondent acquired Southern California Bakery Co., San Diego, California, thereby eliminating the largest independent local wholesale bakery in the San Diego market.

In December 1953 respondent acquired Smith Baking Co., Lincoln, Nebraska, eliminating this independent bakery as a competitive factor in the Lincoln market.

In December 1954 respondent acquired Royal Baking Co., Raleigh, North Carolina, thereby obtaining a bakery and 12 established distribution depots covering the distributional area of eastern North Carolina. This acquisition constitutes a market entry into this area by respondent.

In November 1955 respondent acquired Morton Packing Co., a manufacturer of frozen meat pies, frozen fruit pies, and other frozen food items from plants located at

Crozet, Virginia, and Webster City, Iowa, thereby obtaining a market entry in the line of commerce stated.

In April 1958 respondent acquired DiCarlo's National Bakery, Inc., San Pedro, California, thereby adding to its overall competitive strength in the lower California market area and eliminating one of the remaining competitive independent wholesale bakeries in that area.

Since the acquisition of Omar, Inc., respondent has acquired other bakeries in furtherance of its policy and practice of acquiring bakeries with some of which it had competed prior to such acquisition.

For example, in November 1958 respondent acquired Rochester Bread Company, Rochester, Minnesota, which operated 35 wholesale routes within a 100 mile radius of Rochester and was the largest independent wholesale bakery in the Rochester trade area.

Further, in December 1958 respondent acquired the Braun Baking Co., in Pittsburgh, Pennsylvania, which distributed bread and bakery products in 10 counties in western Pennsylvania. By this acquisition respondent has entered that market area in a strongly competitive position.

Paragraph Seven: Prior to the Omar acquisition alleged herein, respondent competed with Omar, Inc., in the distribution and sale of bread and bread-type rolls in such distributional areas or sections of the country as Omaha, Nebraska; Indianapolis, Indiana; Milwaukee, Wisconsin; and Columbus, Ohio.

For example, prior to the acquisition herein alleged, in the Omaha, Nebraska, marketing or distributional area, or "section of the country", respondent was a leading factor in the supply of bread and bread-type rolls. In 1957 respondent accounted for approximately 10% of the total amount of bread and bread-type rolls marketed in this area. In this same year, Omar, Inc., accounted for approximately 17% of said total amount.

Paragraph Eight: On or about November 29, 1958, the respondent acquired all of the assets of Omar, Inc., for approximately $5,217,850. Thereafter, Omar, Inc.,

became a wholly owned subsidiary of respondent, operating under the name of "Omar Bakery, Inc."

PARAGRAPH NINE: Respondent has violated Section 7 of the amended Clayton Act in that the acquisition of Omar, Inc., as well as the other acquisitions listed in Paragraph Six, either individually or collectively, may have the effect of substantially lessening competition or tending to create a monopoly in the respondent in the following ways, among others:

1. Respondent has become, actually or potentially, the leading and dominant supplier of bread and bread-type rolls within the "section of the country" of the Omaha, Nebraska, marketing or distributing area;
2. Respondent has become, actually or potentially the leading and dominant supplier of bread and bread-type rolls in the other "sections of the country" in which Omar, Inc., had bakery plants, and in which respondent competed with Omar, Inc., in the sale and distribution of these products;
3. Respondent has become, actually or potentially, the leading and dominant supplier of bread and bread-type rolls in the "section of the country" considering the entire distributional area of the bakeries of Omar, Inc., as one "section of the country";
4. Respondent has eliminated actual or potential competition by and between it and Omar, Inc., and between it and the other bakeries acquired as described in Paragraph Six, in each of the "section(s) of the country" or market areas described;
5. Respondent has substantially lessened actual and potential competition throughout the country in the manufacture, sale and distribution of bread and bread-type rolls;
6. Respondent has eliminated Omar, Inc., and the bakeries it has acquired as alleged in Paragraph Six as independent competitive factors in the manufacture, sale and distribution of bread and bread-

type rolls in the "section(s) of the country" described;

7. Respondent has enhanced its competitive advantage in the manufacture, sale and distribution of bread and bread-type rolls to the detriment of actual and potential competition throughout the country;
8. Respondent has significantly increased the trend to industry-wide concentration of the manufacture and sale of bread and bread-type rolls;
9. Respondent has precluded and prevented suppliers of various items and products used in the manufacture, sale and distribution of bread and bread-type rolls from selling same to Omar Bakery, Inc., as they did to Omar, Inc., and to the other bakeries described in Paragraph Six;
10. Respondent has enhanced its power and ability to preclude or foreclose new entrants into the bread and bread-type rolls industry in the sections of the country described.

PARAGRAPH TEN: The foregoing acquisitions and the acts and practices of respondents, as herein alleged constitute violations of Section 7 of the Clayton Act (U.S.C. Title 15, Section 18) as amended and approved December 29, 1950.

COUNT II

PARAGRAPH ELEVEN: All of the allegations of Paragraphs One through Nine hereof are hereby realleged and incorporated herein by reference, and made a part of this Count II as though each were set forth in full herein.

PARAGRAPH TWELVE: By its policies and practices of acquiring bakeries throughout the United States, respondent has acquired the power and ability to achieve an actual or potential monopoly in the manufacture, sale, and distribution of bread and bread-type rolls in the United States.

By virtue of its position in the bakery industry and its continuous growth by acquisitions, respondent has

acquired an actual or potential monopoly power to impede and prevent the growth and business opportunities of its competitors, as well as their ability to survive in the manufacture, sale and distribution of bread and bread-type rolls in the United States.

In the course and conduct of its business in commerce, respondent has used its increasingly dominant position and economic power to engage in, and is now engaged in, performing or effectuating various policies, acts and practices in the business of manufacture, distribution and sale of bread and bread-type rolls in the United States. Among such acts, methods and practices are:

1. Direct payments of cash to grocers for preferred space for the display of respondent's products;
2. Reductions in prices or charges to some grocers or retailers—without relation to any savings in respondent's costs in the manufacture, distribution, or sale of its products—for the purpose, or with the effect, of gaining entry into the stores of such grocers or retailers, thereby enhancing the potential resale of these products at the expense of competitive products;
3. Giving discriminatory rebates, discounts and allowances, by various methods, in order to enable the purchasers of respondent's bread, as well as its other bakery products, to reduce the consumer prices therefore, or in lieu thereof, to enjoy a greater net profit on retail sales of respondent's products.

PARAGRAPH THIRTEEN: The effect of the acquisitions alleged and the consequent and effectuating policies, methods acts and practices of respondent as alleged, has been or may be:

1. To divert to respondent, from its competitors, who are not in the economic position to successfully engage in such policies, methods, acts and practices, a substantial share of the sales of bread and bread type rolls;

2. To discourage or tend to foreclose the entry of any new competitors in the manufacture, distribution and sale of bread and bread-type rolls;
3. To lessen, hinder, restrain and suppress competittion in the manufacture, sale and distribution of bread and bread-type rolls.
4. To actually or potentially enable respondent to dominate the manufacture, sale and distribution of its products, in various sections of the country; and
5. To tend to create a monopoly in respondent in the manufacture, sale and distribution of bread and bread-type rolls in those sections of the country where respondent sells and distributes such products.

PARAGRAPH FOURTEEN: The foregoing policies, methods, acts, practices and acquisitions of respondent, as herein alleged, are all to the prejudice of respondent's competitors and to the public; have a tendency or capacity to hinder and prevent, and have hindered and prevented, actual or potential competition in the manufacture, sale and distribution of bread and bread-type rolls in commerce and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Section 45) and constitute a violation thereof.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 5th day of May , A.D. 1960, issues its complaint against said respondent.

NOTICE

Notice is hereby given to the respondent hereinbefore named that the 19th day of July , A.D. 1960, at 10 o'clock is hereby fixed as the time and Rye, New York, as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered

requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondent is without knowledge thereof, a statement to that effect.

If respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer respondent may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided, and failure to appear at the time and place fixed for hearing, shall be deemed to authorize a hearing examiner, without further notice to respondent, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter to enter an initial decision containing such findings and order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C., this 5th day of May , 1960.

By the Commission.

/s/ Robert M. Parrish,
Robert M. Parrish,
Secretary.

STIPULATION EXHIBIT 5

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 7880

IN THE MATTER OF
CONTINENTAL BAKING COMPANY,
a corporation

AGREEMENT CONTAINING CONSENT ORDER TO DIVEST AND TO CEASE AND DESIST

This agreement herein, by and between Continental Baking Company, a corporation, respondent in Docket No. 7880, by its duly authorized officers and attorneys, and by counsel supporting the complaint, subject to the approval of the Bureau of Restraint of Trade, Federal Trade Commission, is entered into in accordance with Section 3.25 of the Rules of Practice and Procedure of the Federal Trade Commission dated March, 1960. In accordance therewith the parties hereby agree that:

1. Respondent is a corporation doing business under and by virtue of the laws of the State of Delaware with its principal place of business located at Halstead Avenue, Rye, New York.
2. Pursuant to the provisions of Section 7 of the amended Clayton Act, and Section 5 of the Federal Trade Commission Act, the Federal Trade Commission on May 5, 1960, issued its complaint in this proceeding against respondent and a true copy was thereafter duly served on respondent.
3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.
4. This agreement disposes of all of this proceeding as to all parties. The parties agree that the order contained herein is in the public interest for the reasons

set forth in the attached Appendix A which by reference is made a part of this agreement.

5. Respondent waives:

(a) Any further procedural steps;
(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and
(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

9. For the purposes of this agreement, the definition of bread and bread-type rolls shall be that used by the Bureau of the Census as set forth in the Census of Manufactures category S.I.C. 20511.

10. The following order may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Order

I

IT IS ORDERED that respondent, Continental Baking Company, a corporation, through its officers, directors, agents, representatives and employees shall within six (6) months from the date of service of this order upon it by the Federal Trade Commission, divest itself absolutely and in good faith, subject to the aproval by the Com-

mission, of all assets, properties, leases, rights and priviliges, tangible and intangible, including but not limited to all contract rights, plants, machinery, equipment, trade names, trade-marks and goodwill, acquired by respondent as a result of its acquisition of all of the assets of Omar Incorporated, together with all additions and and improvements made by respondent to such plants, machinery buildings, equipment and any other property of whatever description, as may be necessary substantially to reestablish the competition that was previously afforded by Omar Incorporated.

II

IT IS FURTHER ORDERED that respondent shall not sell or transfer the aforesaid assets, tangible or intangible, directly or indirectly, to anyone who at the time of divestiture is a stockholder, officer, director, employee, or agent of, or otherwise directly or indirectly connected with or under the control or influence of the respondent.

III

IT IS FURTHER ORDERED that for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and desist from acquiring directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order, permits such an acqusition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission.

IV

IT IS FURTHER ORDERED that respondent shall submit to the Federal Trade Commission bi-monthly reports describing the action that has been taken and the

efforts that have been made to sell the subject assets. Such reports shall indicate the methods and means employed to effectuate a sale, the result of such actions and efforts and shall set forth the name and address of each person or company contacted, or who has indicated interest in acquiring said assets, together with copies of all correspondence and summaries of all oral communications with such persons or companies.

V

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after divestiture of the subject assets, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

VI

IT IS FURTHER ORDERED that, except as provided in Paragraphs I, II and III of this order, the allegations of the complaint herein are dismissed.

Signed this 28 day of March, A.D., 1962.

CONTINENTAL BAKING COMPANY,
a corporation.

By /s/ R.NEWTON LAUGHLIN,
President
R. Newton Laughlin,
Halstead Avenue,
Rye, New York.

By /s/ ROY M. ANDERSON
Vice President
Roy M. Anderson
Halstead Avenue,
Rye, New York.

APPROVED:

/s/ J. WALLACE ADAIR
J. Walace Adair, Chief,
Division of Mergers,
Bureau of Restraint of Trade.

Covington & Burling,
Attorneys for Respondent

/s/ CECIL G. MILES
Cecil G. Miles,
Assistant Director,
Bureau of Restraint of Trade.

By /s/ PAUL C. WARNKE
Paul C. Warnke

/s/ JOSEPH E. SHEEHY
Joseph E. Sheehy,
Director,
Bureau of Restraint of Trade.

/s/ JOHN H. SCHAFER
John H. Schafer

By /s/ V. ROCK GRUNDMAN, JR.
V. Rock Grundman, Jr.
Counsel Supporting the
Complaint.

By /s/ EDWARD H. MCGRAIL
EDWARD H. MCGRAIL,
Counsel Supporting the
Complaint.

APPENDIX A TO AGREEMENT CONTAINING CONSENT ORDER TO DIVEST AND TO CEASE AND DESIST IN DOCKET NO. 7880

On May 5, 1960, the Commission issued its complaint against respondent, Continental Baking Company, a producer of bread and other bakery products, charging violation of Section 7 of the amended Clayton Act in connection with its acquisition of Omar, Inc., acquired in November 1958; the Rochester Bread Company, acquired in November 1958, and with Braun Baking Company, acquired in December 1958, and with violation of Section 5 of the Federal Trade Commission Act by its continuous practice of acquiring various baking concerns throughout the United States.

Hearings have been held in support of the complaint in Columbus, Ohio; Milwaukee, Wisconsin; Indianapolis, Indiana; and Omaha, Nebraska, as well as the District of Columbia. Further hearings are scheduled in connection with the Omar, Inc. acquisition. Hearings have not been held in Rochester, Minnesota, or Pittsburgh, Pennsylvania in relation to the Rochester and Braun acquisitions.

At the time of the above acquisitions, respondent was engaged in the production, sale and distribution of bakery products, on a wholesale basis, primarily under the trade name of "Wonder" for bread and "Hostess" for cakes. Respondent's products were baked in some 85 plants located in approximately 64 cities in 29 states and the District of Columbia and were distributed throughout 44 states. Respondent's sales for the year 1958 amounted to $328,004,000, and had increased to $410,642,000 in 1960.

The principal acquisition challenged by the complaint was that of Omar, Inc. Prior to its acquisition, Omar, Inc. was engaged in the production and sale of bread and other bakery products in plants located at Omaha, Nebraska; Indianapolis, Indiana; Milwaukee, Wisconsin; and Columbus, Ohio. Whereas respondent sold its products almost exclusively at wholesale to retail food stores, Omar's major distribution was through approximately

1,500 house-to-house retail routes throughout the States of Illinois, Indiana, Iowa, Wisconsin and portions of the States of Missouri, Kentucky and West Virginia. Respondent operated baking plants in each of the cities where Omar plants were located. Omar's sales for the year 1958 amounted to approximately $40,000,000.

The second acquisition alleged was that of the Rochester Bread Company located in Rochester, Minnesota. Rochester was engaged, prior to its acquisition, in the production of bread and other bakery products which it distributed at wholesale throughout the southeastern part of Minnesota and parts of Wisconsin. Rochester's 1958 sales amounted to $1,955,000.

The Braun Baking Company, the third company acquired, was located in Pittsburgh, Pennsylvania. Braun, through its one plant in Pittsburgh, was engaged in the production of bread and other bakery products which it distributed at wholesale in 10 counties in western Pennsylvania. Braun's sales for 1958 amounted to $6,773,902.

The Baking Industry

The Bureau of the Census classifies bread and bread-type rolls in a category separate and distinct from all other bakery products, S.I.C. 20511. This classification recognizes the fact that bread and bread-type rolls are a separate and distinct line of commerce since they contain different ingredients and require different type machinery and personnel for make up and baking than do cake and sweet goods.

Because of the nature of the goods produced, the operations of a baking plant are regional in nature. The distribution of bread and related products is limited by the distance they can be economically shipped to certain points from the plant and at the same time retain their most important characteristic, freshness. The geographical markets in which bakery products may be examined include a metropolitan area, and larger geographical markets such as the total area of distribution in which the acquired company sold bakery products.

The Omar Acquisition

By this acquisition, respondent acquired a company which, by dollar volume of sales, was considered at the time of acquisition as probably the eighth largest baking company in the United States. It acquired four baking plants with modern equipment located in four of the same cities in which respondent plants were located. Omar, Inc. sold and distributed substantially all of its bakery products on a house-to-house retail basis to housewives, rather than through grocery stores and supermarkets as did respondent.

Respondent has used the added capacities of these plants to employ inter-plant cross baking in each of these cities and has used some of the added capacity to extend its operations in the private label market in at least three of the four cities. In Indianapolis, Indiana, the fourth city, respondent entered the retail level by operation of retail concessions within grocery supermarkets. In each of the four cities respondent has increased its market shares.

The sections of the country measured in the Omaha market were the entire distribution area of the respondent's plant located at Omaha, Nebraska, as well as that of Douglas County, Nebraska, which included the metropolitan area of Omaha. Prior to the acquisition, 1958, within the entire distribution area of the respondent's Omaha plant, respondent accounted for 13.7% of the market, while Omar, Inc. accounted for 20.6% for a total of 34.3%. Within metropolitan Omaha, at this same time, respondent accounted for 9.8% and Omar, Inc. 15.2% for a total of 25%. Subsequent to the acquisition, 1959, respondent accounted for a total of 32.5% of their entire area of distribution, and 32.2% in 1960, for this same marketing area. Within the metropolitan Omaha marketing area, respondent accounted for 24.4% and 29.9% for the years 1959, and 1960, respectively.

In the remaining areas where both respondent and Omar operated baking plants, only the county, which was coextensive with the metropolitan area, was measured as a section of the country, each being representative of

the entire distribution areas of each of respondent baking plants. At the time of the acquisition, of all plant shipments and sales of bread and bread-type rolls within Franklin County, Ohio, which is coextensive with the metropolitan area of Columbus, respondent accounted of 12.9% of this market, and Omar accounted for 13.5% for a combined total of 26.4%. For the year 1959, this combined total amounted to 25.7%.

Marion County, Indiana, which is coextensive with metropolitan Indianapolis, was the section of the country measured as being representative of the entire area of distribution of the respondent's Indianapolis plant. Of the total plant shipments and sales of bread and bread-type rolls within this county in 1958, respondent accounted for 14.0% and Omar 14.8% for a total of 28.8%. In 1959 this combined total accounted for 26.5% of this market.

Milwaukee County, Wisconsin, which included metropolitan Milwaukee, was the market area measured as being representative of the area of distribution of respondent's Milwaukee plant. Within this market area in 1958, respondent accounted for 21.4% and Omar 9.5% for a total of 30.9% of the shipments and sales of bread and bread-type rolls. In 1959, this combination accounted for 32.0%.

The Rochester Acquisition

With this acquisition, in November 1958, respondent entered the metropolitan Rochester, Minnesota marketing area, an area in which it had not previously competed. Prior to the acquisition, the Rochester Bread Company was the largest independent wholesale baker in Rochester, which has a population of approximately 40,000. Besides distributing in metropolitan Rochester, the company operated routes which also distributed in approximately 23 counties in southeastern Minnesota, as well as one or two counties in southwestern Wisconsin. The section of the country measured in this acquisition was the entire area of distribution of Rochester Bread Company. The sales of bread and bread-type rolls by all

competitors within this area comprise the market universe and it is from this universe that the percentages of market shares are taken.

In 1958, Rochester's sales of $1,954,949 accounted for 12.6% of all of the sales of bread and bread-type rolls sold and distributed within its entire area of distribution. Plants of respondent, located at Minneapolis, Minnesota, Waterloo and Sioux City, Iowa, distributed on the fringes of Rochester's trading area. In 1958, these plants sold almost $700,000, or 5.8%, in bread and bread-type rolls within this market. None of the respondent plants sold in the City of Rochester, where most of Rochester's sales were concentrated. The combination of Rochester and respondent provided the latter with a combined total of 18.4% of this marketing area. With this market share, however, respondent was not the leading baking company since American Bakeries Corp., the only other national baker in this area accounted for 38.2%. Following were two independent wholesale bakers with 11.9% and 6.3%. Although four chain stores were in this market with their own private label bakery products (A&P, Kroger, National Tea, Red Owl) three accounted for a little over 2.0%, while the fourth, Red Owl accounted for 3.5%. In addition there were fourteen other independent bakers who accounted for anywhere from 0.2% to 5.1% of this market.

Subsequent to the acquisition, there was a reapportionment of the distribution areas of the Rochester and respondent plants. Rochester acquired a portion of the geographical area and some routes from the Waterloo and Sioux City plants, and at the same time traded several low-average routes to the Minneapolis plant in exchange for the same number of routes which had a higher route average. With the additional routes and added geographical area, Rochester's sales increased slightly to $2,005,653 in 1959, and as a result their market shares increased to 13.0% from 12.6%. However, since the respondent plants were no longer distributing in this area, the 13.0% represents an actual loss of 5.4% when compared with the 1958 combined sales which accounted for 18.4% of the market. Ameri-

can Bakeries increased their market share to 44.2%, thus remaining the leader, while most independent bakers either remained stable or reflected an increase in market shars from 0.1% to 1.0%. One baker showed a decrease of 0.3%. In 1960, Rochester's sales decreased to $1,874,710 and remained at approximately the same level for 1961 with sales of $1,878,701.

It is concluded that respondent's acquisition of the Rochester Bread Company has not violated Section 7 of the amended Clayton Act.

The Braun Acquisition

This acquisition by respondent was similar to the Rochester acquisition in that it provided respondent with a baking facility in the Pittsburgh, Pennsylvania marketing area. Prior to the acquisition, respondent had limited distribution in the outskirts of the metropolitan Pittsburgh market. At the time of this acquisition, 1958, Braun was the second leading wholesale baker in the ten county area of western Pennsylvania, with total sales of $6,773,902, representing 16.4% of the market. Ward Baking Company was the leading baker in this marketing area accounting for 16.6%, and A&P was third with 11.9%. Thirty other wholesale bakers competed in the ten county area, including National Biscuit Company (4.6%) and General Baking Company (0.1%). Besides A&P, the large chain grocery stores were Kroger Company (2.8%) and Loblaw, Inc. (0.4%). Kroger maintains its own baking plant, while Loblaw is supplied with private label bread by Hathaway Bakeries. Complete sales data for the ten county marketing area are not available for 1959.

Market share data available for Allegheny County, which includes Pittsburgh, for the years 1958 through 1961, shows that Braun in 1958 had 23% of the market and respondent had 1.7%. By 1961 Braun's market share had decreased to 19.5%, while respondent's was 3.0%. Thus, the total market shares of Braun and respondent combined decreased from the 1958 figure of approximately 25% down to 22.5% in 1961. At the same time there

was substantial growth by National Biscuit Company which increased over the years in question in the Allegheny County marketing area from 4.6% to 11.5%. The market shares of A&P and Kroger decreased slightly, whereas Ward's market share remained approximately the same. All of the decreased market shares seem to have been absorbed by the growth of National Biscuit Company.

Braun's dollar sales in 1961 were less than the total dollar sales in 1958, and the total units sold by Braun had similarly decreased by approximately 9%.

It is concluded that respondent's acquisition of the Braun Baking Company has not violated Section 7 of the amended Clayton Act.

Count II

The Second count of the complaint charges that respondent has violated Section 5 of the Federal Trade Commission Act by its "continuous practice of acquiring various bakeries throughout the United States." The theory of the count is that through these acquisitions, respondent has gained the power to engage in certain acts and practices which constitute unfair competition. The practices alleged are the making of payments for shelf space and entry into retail outlets, and the granting of discriminatory rebates, discounts and allowances.

The practices alleged in the second count as violations of Section 5 of the Federal Trade Commission Act might, if proven, be cognizable as well under Section 2 of the Clayton Act, as amended, by the Robinson-Patman Act. The legality of these pricing practices in themselves, however, is not intended to be challenged in this proceeding, but, rather, the enumerated practices are asserted as manifestations of the economic power attained through the continuous practice of acquisition.

The proposed Order, which is part of the Agreement to which this Appendix is attached, calls for complete divestiture of all the assets of the former Omar, Inc., which was probably the eighth largest baker in the

country at the time of acquisition. One of the principal problems in the baking industry is the tendency towards concentration and the continuous growth of major baking companies through acquisition. Such acquisitional growth and tendency towards concentration places in the hands of a few large companies the means to set the pattern of competition, not only among themselves, but also for all local baking companies serving any given area. The Omar, Inc. acquisition constituted the principal allegation of the complaint. Coupled with the divestiture is the order that the respondent shall cease and desist from acquiring for ten years any concern engaged in the production and sale of bread and bread-type rolls. If this order is adopted by the Commission, the respondent's alleged continuous practice of acquiring companies baking and selling bread and bread-type rolls will be brought to a halt and the major acquisition forming the gravamen of the complaint will be undone. Competition may be restored essentially as it existed before the acquisition of Omar, Inc., and the public interest will be well served.

One additional factor considered by counsel supporting the complaint and counsel for respondent in reaching this agreement is the fact that there are presently being litigated complaints of the Commission against the respondent, also relating to bread products, alleging violations of Section 2(a) and 2(d) of the Clayton Act as amended by the Robinson-Patman Act, Docket No. 7630, and violation of Section 5 of the Federal Trade Commission Act, Docket No. 8309.

It is, therefore, respectfully submitted that this consent order is in the public interest and should be issued by the Commission.

STIPULATION EXHIBIT 6

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 7880

In the Matter of
CONTINENTAL BAKING COMPANY,
a corporation.

INITIAL DECISION

By Wilmer L. Tinley, Hearing Examiner.

Edward H. McGrail and V. Rock Grundman, Jr., for the Commission.

Covington & Burling, Washington, D.C., By Paul C. Warnke and John H. Schafer, for the Respondent.

On May 5, 1960, the Commission issued its complaint against respondent, Continental Baking Company, a producer of bread and other bakery products, charging violation of Section 7 of the amended Clayton Act in connection with its acquisition of Omar, Inc. and Rochester Bread Company, in November 1958, Braun Baking Company, in December 1958, and certain other companies during the period 1952 through 1958; and with violation of Section 5 of the Federal Trade Commission Act by its continuous practice of acquiring various baking concerns throughout the United States.

Hearings have been held in support of the complaint in Columbus, Ohio, Milwaukee, Wisconsin, Indianapolis, Indiana, and Omaha, Nebraska, as well as the District of Columbia. Further hearings, which were scheduled,

were cancelled because of submission by counsel of the agreement hereinafter referred to.

By its Order of February 28, 1962, the Commission waived in this case the provision of its Notice of July 14, 1961, requiring the filing prior to September 1, 1961, of a notice of intent to dispose of any pending proceeding by consent agreement; and referred to the hearing examiner for appropriate consideration under the applicable Rules of Practice the request of February 26, 1962, by counsel supporting the complaint on behalf of all parties to the proceeding, which was considered as a notice, timely filed, of intent to dispose of the proceeding by consent agreement.

Thereafter, on March 28, 1962, there was submitted to the hearing examiner an "Agreement Containing Consent Order to Divest and to Cease and Desist", which agreement was entered into by and between Continental Baking Company, by its duly authorized officers and attorneys, and by counsel supporting the complaint, with the approval of the Chief, Division of Mergers, and the Director, Bureau of Restraint of Trade, in accordance with Section 3.25 of the Commission's Rules of Practice in effect prior to July 21, 1961. By the terms of said agreement, the parties agree that:

1. Respondent is a corporation doing business under and by virtue of the laws of the State of Delaware with its principal place of business located at Halstead Avenue, Rye, New York.

2. Pursuant to the provisions of Section 7 of the amended Clayton Act, and Section 5 of the Federal Trade Commission Act, the Federal Trade Commission on May 5, 1960, issued its complaint in this proceeding against respondent and a true copy was thereafter duly served on respondent.

3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. The agreement disposes of all of this proceeding as to all parties; and that the order contained

therein is in the public interest for the reasons set forth in Appendix A which is attached to the agreement and by reference is made a part thereof.

5. Respondent waives:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement.

7. The agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission.

8. The agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

9. For the purposes of the agreement, the definition of bread and bread-type rolls shall be that used by the Bureau of the Census as set forth in the Census of Manufacturers category S.I.C. 20511.

10. The order incorporated in the agreement may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

The hearing examiner has considered the agreement and the order contained therein, together with the representations made in Appendix A attached thereto, and is of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding in the

public interest. The content of the agreement meets all of the requirements of Section 3.25(b) of the Commission's Rules of Practice in effect prior to July 21, 1961. The agreement is, accordingly, hereby accepted, and the following order is issued.

ORDER

I

IT IS ORDERED that respondent, Continental Baking Company, a corporation, through its officers, directors, agents, representatives and employees shall within six (6) months from the date of service of this order upon it by the Federal Trade Commission, divest itself absolutely and in good faith, subject to the approval of the Commission, of all assets, properties, leases, rights and privileges, tangible and intangible, including but not limited to all contract rights, plants, machinery, equipment, trade names, trade-marks and goodwill, acquired by respondent as a result of its acquisition of all of the assets of Omar Incorporated, together with all additions and improvements made by respondent to such plants, machinery buildings, equipment and any other property of whatever description, as may be necessary substantially to reestablish the competition that was previously afforded by Omar Incorporated.

II

IT IS FURTHERED ORDERED that respondent shall not sell or transfer the aforesaid assets, tangible or intangible, directly or indirectly, to anyone who at the time of divestiture is a stockholder, officer, director, employee, or agent of, or otherwise directly or indirectly connected with or under the control or influence of the respondent.

III

IT IS FURTHER ORDERED that for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and

desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order, permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission.

IV

IT IS FURTHER ORDERED that respondent shall submit to the Federal Trade Commission bi-monthly reports describing the action that has been taken and the efforts that have been made to sell the subject assets. Such reports shall indicate the methods and means employed to effectuate a sale, the result of such actions and efforts and shall set forth the name and address of each person or company contacted, or who has indicated interest in acquiring said assets, together with copies of all correspondence and summaries of all oral communications with such persons or companies.

V

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after divestiture of the subject assets, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

VI

IT IS FURTHER ORDERED that, except as provided in Paragraphs I, II and III of this order, the allegations of the complaint herein are dismissed.

/s/ Wilmer L. Tinley
WILMER L. TINLEY
Hearing Examiner

April 2, 1962.

STIPULATION EXHIBIT 18

CONTINENTAL BAKING COMPANY
(INCORPORATED)

Executive Offices

HALSTEAD AVENUE
RYE, NEW YORK 10580

P.O. Box 731 Telephone (914) 967-4747

April 10, 1967

Mr. Carl J. Batter, Jr.
Attorney, Compliance Division
Bureau of Restraint of Trade
Federal Trade Commission
Washington, D.C. 20580

Re: Continental Baking Company
Docket No. 7880.

Dear Mr. Batter:

This is a reply to your letter of February 27, 1967, requesting certain information with respect to the Bon Ton Bakery. Inasmuch as some of your questions asked for information that would only be in possession of Mr. Alex Stepanzoff, the former operator of the Bon Ton Bakery, we have asked him to write us his responses where called for. Mr. Stepanzoff's letter is enclosed.

1-2. Attached to this letter are copies of the agreements in existence between Continental Baking Company and the Bon Ton Bakery from May 11, 1962 to date marked Schedule 1. You will note that there was a distributor agreement in effect from April 23, 1953 until May 1965 covering cake products. Actually, the cake distributorship commenced long before April 23, 1953.

Our agreements with Bon Ton, and the negotiations which led up to them, were all at the instigation of Mr.

Stepanzoff and were substantially as follows: Sometime in the early part of 1965 when Mr. Stepanzoff approached Mr. W. C. Noorda, Manager of our Spokane, Washington Bakery, and expressed concern over his rising production costs and resulting lowered profits, he stated his desire to have Continental take over his operation. Mr. Stepanzoff was told by Mr. Noorda that Continental could not purchase his bakery. Mr. Stepanzoff then suggested working out a bread distributorship, and Mr. Noorda subsequently advised Mr. Stepanzoff that Continental could add bread products to the cake line we were then supplying. Thereafter, in the early part of May 1965, arrangements with reference to Bon Ton becoming a full line bakery products distributor were worked out between Mr. Stepanzoff of Bon Ton and Mr. Noorda and Mr. Gordon Thomas of Continental. Our recollection of these discussions is substantially the same as that stated by Mr. Stepanzoff; specifically, that the discount was increased and that there was discussion of Mr. Stepanzoff's reluctance to commit himself to a long term as a distributor.

The new distributorship agreement covering both bread and cake was a year to year agreement, automatically renewed for a year unless terminated on ninety days' written notice, i.e., early in February of each year. Neither party gave the notice in February of 1966 that would have been necessary to terminate the distribution arrangements for the 1966-1967 year. However, in March of 1966, Mr. Stepanzoff contacted Mr. Noorda and expressed considerable and increasing discontent with his obligations under the contract. Mr. Stepanzoff asked Mr. Noorda whether Continental would be willing to relieve him of his obligations under the distributorship agreement by assuming for itself the distribution of its products. We wanted to comply with Mr. Stepanzoff's wishes if we could since, as a business matter, a distributor who is not interested in actively promoting his business is a definite drag on the bakery sales and profits. Finding another distributor in western Montana to take over Bon Ton's distribution assets was not a realistic possibility. It would of course have been very

simple to abandon Mr. Stepanzoff entirely simply by leasing depot space and trucks—the only assets necessary to continued distribution of Continental's products in that market. For obvious reasons we did not want to treat Mr. Stepanzoff in this way. Therefore, Mr. Noorda agreed, after consulting with the home office, that Continental itself would take over Mr. Stepanzoff's distributorship of Continental's bread and cake products. The arrangements for this transfer were made in Missoula between Mr. Stepanzoff and Messrs. Noorda and Thomas in the middle of March, 1966.

3. Bon Ton commenced the distribution of bread products produced by Continental at its Spokane, Washington bakery on July 12, 1965. Attached hereto, marked Schedule 2, is a recap of the weekly dollar sales of bread products to Bon Ton from the week ending July 17, 1965, through the week ending March 26, 1966. Figures showing the count or poundage involved are not maintained.

4. To the best of our knowledge Bon Ton terminated production of bread products on July 10, 1965. Please refer to Mr. Stepanzoff's letter for the remainder of the information requested.

5. The only assets acquired were Bon Ton's accounts receivable, its trademark "Bon Ton" (which was no longer in use), its good will, all but approximately $1,800 of its bank account, and title to its trucks. In consideration, Continental cancelled all outstanding invoices for products sold to Bon Ton, and also cancelled the outstanding indebtedness on a loan previously made to Mr. Stepanzoff for working capital.

6. No formal contracts of employment have ever been made between Continental and Mr. Stepanzoff or with any of the former employees of Bon Ton. Following termination of production by Bon Ton some production employees were hired by our Spokane, Washington bakery. Others obtained employment with the Safeway Bakery in Missoula, Montana, and with other employers. At the time Continental took over the distributorship in March of 1966 it took assignment of the labor contract with the Teamsters Union and thereafter those Teamster

members became Continental employees under the same union contract terms. Since March of 1966 Mr. Stepanzoff has been employed at a salary of $200 per week commencing March 28, 1966.

7. See Mr. Stepanzoff's letter.

8. See Mr. Stepanzoff's letter. For a short period of time after July of 1965 Continental sold the Bon Ton Bakery certain bread products carrying the trademark "Bon Ton." Thereafter all bread products sold to this distributor carried the trademark "Wonder."

9. See Mr. Stepanzoff's letter.

10. Consideration for Mr. Stepanzoff's distributorship did not include any payments in cash or checks.

We trust that this will satisfactorily answer all the questions you may have on Missoula.

Very truly yours,

CONTINENTAL BAKING COMPANY

/s/ Roy M. Anderson
ROY M. ANDERSON
Vice-President and
General Counsel

RMA:eb
Enc.

cc: John H. Schafer, Esq.

Stipulation Exhibit 18B

Sales Agreement

Independent Dealer

This Agreement made and entered into this day of May, 1965, between Continental Baking Company (hereinafter referred to as "Company") and Alexander Stepanzoff residing at Missoula, Montana (hereinafter referred to as "Dealer").

WITNESSETH

For and in consideration of the mutual covenants of the parties hereto, Company hereby agrees to sell to Dealer and Dealer agrees to purchase from Company, Dealer's requirements of bakery products produced by Company or carried in its line, as they shall be ordered by Dealer from time to time, subject to the following conditions:

1. All products ordered by Dealer will be sold to him F.O.B. Missoula, Montana at Company's prevailing wholesale prices in Missoula, Montana, as they may be from time to time, less a discount of 25%.

2. Company hereby assigns to Dealer as his exclusive sales territory the area circumscribed on the map attached hereto. The assigned territory may be enlarged or limited by the parties upon their mutual agreement.

3. (a) Company will invoice Dealer for products delivered to him with each delivery. In addition, Company will invoice the Dealer 10¢ for each shipping carton delivered to Dealer. A credit of 10¢ per carton will be given to Dealer upon its return to Company's transport trailer. No credit will be allowed on damaged shipping cartons to the extent that the damage thereto exceeds Company's normal experience on damaged cartons. (b) Dealer must pay each invoice within 10 days of receipt by Dealer

failing which Company may suspend deliveries and/or terminate this agreement on three (3) days advance written notice. (c) Company will accept in payment of invoices cash, cashier check, or checks drawn on Dealer.

4. Company will supply Dealer at Company's expense all special display racks ordered by Dealer subject, however, to Company's approval thereof. Dealer will be required to maintain all racks in good merchandising condition and to replace same when necessary for proper display of products.

5. Dealer agrees to devote his personal efforts at all times to sell and service the territory covered by this agreement. Each account will be served with full rack service with Dealer crediting each account for stale returns and damaged goods. Dealer will be responsible for the expense of all stale returns and damaged goods.

6. In the event Dealer's net receipts, including charges, from the sale of products purchased from Company over any one (1) week period, after deduction of all expenses of operating the dealership, shall amount to less than $200 per week, Company will adjust Dealer's discount set forth in paragraph 1, retroactive to the beginning of any such week, to a discount percentage which will result in the net receipts to Dealer, after deduction of expenses, of $200 for said week. In the event Dealer's net receipts, including charges, from the sale of products purchased from Company over any four (4) week period, after deduction of all expenses of operating the dealership, shall amount to more than $800, the discount to Dealer for ensuing weeks shall be adjusted downwards to a discount percentage which would have resulted in net receipts to Dealer for said four (4) week period, after deduction of expenses, of $800. The first one (1) week period and the first four (4) week period shall be deemed to commence on the first Monday following commencement of performance under this Agreement.

7. It is anticipated that occasions may arise when Dealer may not give his personal attention to the selling and servicing of accounts in his territory. In the event Dealer is unable to perform his duties due to illness or in the event Dealer elects to be absent for vacation purposes, subject to the requirements set forth below, Company will supply to Dealer at no cost to Dealer and Dealer will accept from Company a supervisory employee of Company who will manage the dealership during the period of illness or vacation.

During the first year of this Agreement, Dealer may elect to take one (1) week's vacation; during the second year through the tenth year of this Agreement Dealer may elect to take two (2) weeks' vacation; thereafter Dealer may elect to take three (3) weeks' vacation per year. Dealer agrees to give Company six (6) months' advance written notice of his intent to take a vacation.

8. At all times during the terms of this Agreement Dealer shall, at his expense, maintain comprehensive general public liability and property damage insurance with an insurance company acceptable to Company naming Company as an additional insured. Said insurance shall be written in limits of no less than $100,000/$300,000 bodily injury and $25,000 property damage. A certificate evidencing said coverage shall be delivered to Company on demand.

9. The obligation of Company to deliver products to Dealer and Dealer's obligation to purchase his requirements of products from Company shall be subject to interruption or delays caused by strikes, labor difficulties, acts of God, equipment failures, and casulties not within the control of the parties hereto.

10. In the event of a termination of this Agreement for any reason whatsoever, Dealer covenants and agrees he will not compete with Company or with another Dealer of Company in the sale of products similar to those covered by this Agreement and in

the territory covered by this Agreement for the period of five (5) years.

11. In the event of death of Dealer or termination of this Agreement pursuant to the provisions in paragraph 16, the Company shall have the option, to be exercised within 30 days of date of death or termination of the Agreement, to purchase Dealer's dealership including all delivery vehicles, trademarks, tradenames, and wire trays at a price of $37,500.00.

In the event Company does not exercise its option to purchase and the dealership is sold to a third party this contract will continue in effect as to said third party provided he shall meet Company's credit requirements.

12. Dealer covenants and agrees as follows:

A. To service all accounts in his territory as often as may be necessary to develop maximum sales, but at least once per day excluding Sundays.

B. To install point of purchase material, supplied by Company at its expense, in accordance with the recommendations of Company and in amounts adequate to insure maximum sales and advertising benefit from promotional programs.

C. To use his best efforts to arrange for in-store demonstrations of Company's products subject to Company's prior written approval of the demonstration and the demonstrator to be employed. Company agrees to pay the wages of the demonstrator and to supply any give-aways to Dealer at no cost to Dealer. The expenses of any samples utilized during the demonstration will be at Company's expense.

D. To keep his trucks properly painted at all times in accordance with Company specifications. Company will supply Dealer with truck decals at Company's expense.

E. To conform to Company's code requirements for the age of products purchased from Company and sold to Dealer's accounts.

F. To sell in his territory only products carried by Company in its line or those for which Dealer obtains prior written approval from the Company.

G. To keep and maintain route books containing the name, address, and weekly purchases of each account in Dealer's territory. These route books shall be deemed an asset of the dealership and shall be transferred with the dealership in accordance with the provisions of this Agreement.

H. To operate and maintain in a safe and sanitary condition delivery trucks adequate to properly sell and service all accounts in the territory.

I. To comply at all times with any applicable Federal, State or Local Food and Drug Laws and regulations.

J. To maintain, at Dealer's expense, sanitary warehouse space for the receipt and storage of products purchased from Company, said warehouse space to have proper access for a transport trailer.

K. Sell all products purchased from Company at established wholesale prices and in accordance with the Company's established discount policies.

13. In the event Dealer shall breach any terms of this Agreement including any of the covenants set forth in paragraphs 3 and 12 hereof, then Company may terminate this Agreement on 10 days advance written notice.

14. In the event of termination of this Agreement for any reason whatsoever, Dealer agree to obliterate

any and all advertisements and references to Company or Company's trademarks from his delivery equipment before it is used for any other purpose whatsoever.

15. All private label sales shall be at the sole discretion of Company and Dealer shall not solicit any such business. Company reserves the right to make warehouse delivery or store-door delivery of private label products in the territory without any obligation whatsoever to Dealer.

16. Dealer agrees that during the term of this Agreement Company shall have the right and license to use Dealer's trademark "Bon Ton" on any or all bakery products supplied by Company to Dealer pursuant to this Agreement. Upon termination of this Agreement for any reason, Company shall discontinue any and all use of said trademark.

17. Except as otherwise provided herein, this Agreement shall remain in effect for the period of one (1) year from the date hereof and shall be automatically renewed from year to year therafter provided, however, that either party may terminate this Agreement after one (1) year or at the end of any anniversary year thereafter upon 90 days advance written notice.

IN WITNESS WHEREOF, the Company has caused this Agreement to be executed in its name and on its behalf by its agent, and the Dealer has hereunto set his hand and seal, the day and year first above written.

CONTINENTAL BAKING COMPANY

ATTEST:

/s/ Illegible By /s/ W. H. Noorda

WITNESS:

/s/ Illegible /s/ ALEX STEPANZOFF

STIPULATION EXHIBIT 18F

535 Keith Avenue
Missoula, Montana
April 8, 1967

Mr. Roy M. Anderson, Vice President
Continental Baking Company
Executive Offices
Halstead Avenue
Rye, New York, 10580

Dear Mr. Anderson:

Since the Federal Trade Commission has requested you to furnish certain information pertaining to my operations in Missoula, Montana, I hope this letter will help you comply with the request.

First, I want you to know that my training was in banking, and not baking. My father-in-law, Mr. Eugene Graf, Sr., was in the baking business with his son for a long time, and finally prevailed upon me to resign my position with the Chase National Bank of New York, and enter the family business as financial advisor.

By 1961, however, my in-laws got out of the baking business, and I was left as sole owner of the Bon Ton Bakery of Missoula.

It was then that I began to feel the strain of carrying too big a load in production, distribution, and management. There was a shortage of skilled and competent people in the baking industry, here in Missoula, and I was handicapped in my operations, especially in supervisory personnel.

To evaluate my situation, and the outlook for the future, I employed the services of industrial consultants, the George S. May Company.

In 1962 I was hospitalized for a minor coronary occlusion, and was advised by my physician to curtail my activities.

In 1963 I was operated for bleeding ulcers, when half of my stomach was removed.

In 1964, due to the increased costs of ingredients, labor, and lack of automation, I sustained a substantial loss for the first time in the history of my operations. It was around $25,000.00.

The outlook for the future was uncertain, and I was getting older—sixty-five this coming June. My wife and my daughter discussed our future, and pleaded with me to do something about the bakery operations, to get them out of my estate.

In 1965 negotiations with the Bakers' Union, a severance clause was introduced for the first time. It provided that should any bakery be sold, every employe of that bakery was to be paid an additional compensation, "a weekly wage for each year employed by that bakery."

This, of course, would have added financial strain on my family, and also made it less attractive to any prospective buyer.

I realized too, how much simpler my problems were as a distributor of Hostess Cakes throughout Western Montana. Therefore, it was only natural for me to bring this matter to the attention of my good friend, Mr. Wif Noorda, Manager of the Continental Baking Company Plant in Spokane, Washington, when he visited Missoula on cake business. This plant supplied me with cakes for many years.

The personnel of the plant was most kind, cooperative, and helpful to me, and I established a deep personal friendship with the management of that plant.

When Mr. Noorda informed me that the Continental Baking Company could not buy my bakery, I told him that I had decided to get out of production as soon as possible, and therefore, would like to distribute Wonder Bread, as well as Hostess Cakes. Mr. Noorda agreed to cooperate.

The final agreement was worked out by Mr. Noorda, Mr. Thomas, and me. My discount on Continental mer-

chandise was increased from 20 to 25 percent. Duration of the distribution agreement was on year to year basis, with options to terminate on 90 days' written notice. It was also agreed that I could sell my distributorship, on approval, to a third party.

I needed more working capital to accommodate Continental's stricter credit requirements, and they agreed on a loan of $37,500.00, but insisted on some security in case of my death. I agreed to give them an option to purchase my distributorship for the amount of the loan, as it was a fair value for the distributorship assets. This distributorship was in operation most of the year when new problems arose.

With the Teamsters' Union demand for a five-day week, and Eddy's demand for a six-day distribution, since their production was also on a six-day basis, while that of the Continental Baking Company of Spokane, Washington, was on a five-day basis for my supplies, I faced a competitive disadvantage of distribution of two-day old bread on Wednesdays.

On March 1, 1966, I had a scare of a second heart attack, and was briefly hospitalized.

My family then insisted that I sell my distributorship, as they did not want it on their hands should anything happen to me.

I brought these problems to the attention of Mr. Noorda, and asked him to buy my distributorship. This transaction was consummated by the end of March of 1966.

In the meantime, I sold a Panomat, and two wrapping machines to Cohen Bros of Chicago, and some equipment to the Super Save in-store bakery here in Missoula. I expect to be selling still other equipment.

We also used our Miracle Mix in one of our breads until 1962, when this trade mark was sold to the National Biscuit Company of New York. This trade mark, however was the development and the property of my father-in-law, Mr. Eugene Graf, Senior, and he received money for the sale of it.

As a citizen of Missoula, Montana, I have had many honors, and in return, I do what I can for the community.

I am Director of the Missoula City Bank, a Senior Member of the University of Montana Executive Board, and a member of the Cosmos Club, Rotary, and the Elks. Enclosed please find audited profit and losses, and balance sheets for 1962-1964, as well as Bon Ton and Federal income tax returns for 1965.

Sincerely,

ALEX STEPANZOFF

AS:jgs

Enc's

P.S. Production figures for 1965 are no longer available, as I had no use for them on the termination of my distributorship.

FORM 575 - 11-20-50

STIPULATION EXHIBIT 18G

SCHEDULE "2"

RECORD OF GROSS SALES BY WEEKS TO BON TON # MISSOULA, MONTANA FROM 7-5-1965 to 3-26-66

Week Ending Date	Bread Sales	Cake Sales	Sweet Goods Sales		TOTAL GROSS SALES		
7-12-65	12 [illegible] 19	2 948 89	1460 59		17 389 17		
7-24	15 252 36	2 793 11	1424 13		17 469 50		
7-31	11 622 01	2561 39	1402 48		15 585 88		
8-7	12 622 44	2183 35	1150 15		15 356 94		
8 14	12 081 91	2 135 21	1000 09		15 217 21		
8 21	11 738 80	2 119 74	1065 09		14 923 63		
8 28	11 638 97	2 427 11	1206 80		15 272 88		
9 4	11 071 81	2 281 40	1117 78		14 470 99		
9 11	8 973 70	2 583 40	967 49		12 524 59		
9 18	8 944 30	2 285 23	918 66		12 148 19		
9 25	8 778 60	2162 93	743 14		11 684 67		
	123 105 49	26 481 76	12 456 40		162 043 65		
10 2	9 552 10	2 175 26	766 43		12 493 79		
10 9	9 425 48	2 358 77	1022 81		12 807 06		
10 16	9 715 38	2 428 16	728 30		12 871 84		
10 23	9 665 21	2 335 45	659 02		12 659 68		
10 30	10 354 02	2 705 93	817 03		13 876 98		
11 6	9 472 31	2 812 65	693 88		12 978 84		
11 13	9 454 35	2 156 99	550 19		12 161 53		
11 20	10 429 33	3 034 34	790 63		14 254 30		
11 27	10 671 48	3 049 83	535 38		14 256 69		
12 4	9 817 98	2 446 56	761 01		13 025 55		
12 11	10 184 91	[illegible]6 47	468 65		13 420 03		
12 18	10 110 83	2 930 31	524 55		13 565 69		
12 24	8 917 86	1 433 78	519 99		10 771 63		
	127 671 24	32 634 50	8 837 87		169 143 61		
1 1 66	8 721 79	1 313 06	381 42		10 416 27		
1 8	10 696 80	2 419 85	417 12		13 533 77		
1 15	9 870 72	2 274 73	631 49		12 776 94		
1 22	9 373 91	2 329 60	411 50		12 115 01		
1 29	9 713 93	2 189 23	593 25		12 496 41		
2 5	10 323 57	2 515 22	469 33		13 308 12		
2 12	10 588 34	2 533 05	637 03		13 758 42		
2 19	10 273 94	2 517 05	560 55		13 351 54		
2 25	10 216 29	2 300 68	543 74		13 060 71		
3 5	10 125 40	3 203 19	658 22		13 986 81		
3 12	10 295 91	2 405 24	671 98		13 373 13		
3 19	9 472 91	2 172 22	425 45		12 070 58		
3 26	9 146 40	3 029 12	595 78		12 771 30		
	124 819 91	31 202 24	6 996 91		167 019 01		

Week Ending Date	Bread Sales	Cake Sales	Sweet Goods Sales	TOTAL GROSS SALES
7-17-65	12 [illegible] 19	2 948 89	1 460 59	17 389 17
7 24	13 [illegible] 36	2 793 11	1 424 13	17 469 50
7 31	11 [illegible] 01	2 561 39	1 402 48	15 585 88
8 7	12 [illegible] 44	2 183 55	1 150 15	15 356 94
8 14	12 081 91	2 135 21	1 000 09	15 217 21
8 21	11 738 80	2 119 74	1 065 09	14 923 63
8 28	11 638 97	2 427 11	1 206 80	15 272 88
9 4	11 071 81	2 281 40	1 117 78	14 470 99
9 11	8 973 70	2 583 40	967 49	12 524 59
9 18	8 944 30	2 285 23	918 66	12 148 19
9 25	8 778 60	2 162 93	743 14	11 684 67
	123 105 49	26 481 76	12 456 40	162 043 65
10 2	9 552 10	2 175 26	766 43	12 493 79
10 9	9 425 48	2 358 77	1 022 81	12 807 06
10 16	9 715 38	2 428 16	728 30	12 871 84
10 23	9 665 21	2 335 45	659 02	12 659 68
10 30	10 354 02	2 705 93	817 03	13 876 98
11 6	9 472 31	2 812 65	693 88	12 978 84
11 13	9 454 35	2 156 99	550 19	12 161 53
11 20	10 429 33	3 034 34	790 63	14 254 30
11 27	10 671 48	3 049 83	535 38	14 256 69
12 4	9 817 98	2 446 56	761 01	13 025 55
12 11	10 184 91	[illegible] 647	468 65	13 420 03
12 18	10 110 83	2 930 31	524 55	13 565 69
12 24	8 317 86	1 433 78	519 99	10 771 63
	127 671 24	32 634 50	8 837 87	169 143 61
1 1 66	8 721 79	1 313 06	381 42	10 416 27
1 8	10 696 20	2 419 85	417 12	13 533 77
1 15	9 870 72	2 274 73	631 49	12 776 94
1 22	9 373 91	2 329 60	411 50	12 115 01
1 29	9 713 93	2 189 23	595 25	12 496 41
2 5	10 323 57	2 515 22	469 33	13 308 12
2 12	10 588 34	2 533 05	637 03	13 758 42
2 19	10 273 94	2 517 05	560 55	13 351 54
2 25	10 216 29	2 300 68	543 74	13 060 71
3 5	10 125 40	3 203 19	658 22	13 986 81
3 12	10 293 91	2 405 24	671 98	13 373 13
3 19	9 472 91	2 172 22	425 45	12 070 58
3 26	9 146 40	3 229 12	595 78	12 971 30
	124 819 91	31 202 24	6 971 91	167 019 01
LIBBY/	641 00	229 00	50 00	920 00
WOOLARD KALISPELL	1 535 00	275 00	46 00	1 8[illegible] 00
				27[illegible] 00

Stipulation Exhibit 22

Sales Agreement

Independent Dealer

THIS AGREEMENT made and entered into this 17th day of April, 1966, between CONTINENTAL BAKING COMPANY (hereinafter referred to as "Company") and WYOMING BAKING COMPANY of Casper, Wyoming (hereinafter referred to as "Dealer").

WITNESSETH

For and in consideration of the mutual covenants of the parties hereto, Company hereby agrees to sell to Dealer, and Dealer agrees to purchase from Company, Dealer's requirements of bakery products produced by Company or carried in its line, as they shall be ordered by Dealer from time to time, subject to the following conditions:

1. All products ordered by Dealer will be sold to him F.O.B. Casper, Wyoming at Company's prevailing wholesale prices in Casper, Wyoming, as they may be from time to time, less a discount of 30% on cake and sweet goods items and a discount of 38% on bread items.

2. Company hereby assigns to Dealer as his exclusive sales territory the area circumscribed in red on the map attached hereto. In addition to this, Company hereby assigns to Dealer as non-exclusive sales territory the area circumscribed in blue on said map. These assigned territories may be enlarged or limited by the parties upon mutual agreement.

3. (a) Company will invoice Dealer for products delivered to him with each delivery.

(b) Dealer must pay each invoice within ten days of receipt by Dealer, failing which, Company may suspend deliveries and/or terminate this agreement on three (3) days advance written notice.

(c) Company will accept in payment of invoices cash, cashier checks, or checks drawn on Dealer.

4. Company will supply Dealer at Company's expenses all special bread and cake display racks ordered by Dealer, subject however to Company's approval thereof. Dealer will be required to maintain all racks in good merchandising condition and to replace same when necessary for proper display of products.

5. Dealer agrees to devote his personal efforts at all times to sell and service the territory covered by this agreement. Each account will be served with full rack service with Dealer crediting each account for stale returns and damaged goods. Dealer will be responsible for the expense of all stale returns and damaged goods.

6. It is anticipated that occasions may arise when Dealer may not give his personal attention to the selling and servicing of accounts in his territory. In the event Dealer is unable to perform his duties due to illness or in the event Dealer elects to be absent for vacation purposes, subject to the requirements set forth below, Company will supply to Dealer at no cost to Dealer, and Dealer will accept from Company a supervisory employee of Company who will manage the dealership during the period of illness or vacation.

During the first year through the tenth year of this agreement, Dealer may elect to take two (2) weeks' vacation; thereafter Dealer may elect to take three (3) weeks' vacation per year. Dealer agrees to give Company six (6) months' advance written notice of his intent to take a vacation.

7. At all times during the terms of this agreement, Dealer shall, at his expense, maintain comprehensive general public liability and property damage insurance with an insurance company acceptable to Company naming Company as additional insured. Said insurance shall be written in limits of no less than \$100,000/\$300,000 bodily injury and \$25,000 property damage. A certificate evidencing said coverage shall be delivered to Company on demand.

8. The obligation of Company to deliver products to Dealer and Dealer's obligation to purchase his requirements of products from Company shall be subject to interruption or delays caused by strikes, labor difficulties,

acts of God, equipment failure, and casualties not within the control of the parties hereto.

9. In the event of a termination of this agreement for any reason whatsoever and Company shall exercise it's option to purchase the dealership as provided in Paragraph 10, then Dealer covenants and agrees he will not compete with Company or with another Dealer of Company in the sale of products similar to those covered by this agreement and in the territory covered by this agreement for the period of five (5) years.

10. In the event of death of Dealer or termination of this agreement pursuant to the provisions in Paragraph 15, the Company shall have the option, to be exercised within thirty (30) days of date of death or termination of this agreement, to purchase Dealer's dealership including all delivery vehicles, trademarks, tradenames, route books, and delivery equipment at a price of $170,000.00.

In the event Company does not exercise it's option to purchase and the dealership is sold to a third party, this contract will continue in effect as to said third party provided it shall meet Company's credit requirements.

11. Dealer covenants and agrees as follows:

a. To service all accounts in his territory as often as may be necessary to develop maximum sales, but at least once per day excluding Sundays.

b. To install point of purchase material, supplied by Company at its expense, in accordance with the recommendations of Company and in amounts adequate to insure maximum sales and advertising benefit from promotional programs.

c. To use his best efforts to arrange for in-store demonstrations of Company's products subject to Company's prior written approval of the demonstration and the demonstrator to be employed. Company agrees to pay the wages of the demonstrator and to supply any give-aways to Dealer at no cost to Dealer. The expenses of any samples utilized during the demonstration will be at Company's expense.

d. To keep his trucks properly painted at all times in accordance with Company specifications. Company will supply Dealer with truck decals at Company's expense.

e. To conform to Company's code requirements for the age of products purchased from Company and sold to Dealer's accounts.

f. To sell in his territory only products carried by Company in its line or those for which Dealer obtains prior written approval from the Company.

g. To keep and maintain route books containing the name, address, and weekly purchases of each account in Dealer's territory. These route books shall be deemed an asset of the dealership and shall be transferred with the dealership in accordance with the provisions of this agreement.

h. To operate and maintain in a safe and sanitary condition delivery trucks adequate to properly sell and service all accounts in the territory.

i. To comply at all times with any applicable Federal, State or local Food and Drug Laws and Regulations.

j. To maintain, at Dealer's expense, sanitary warehouse space for the receipt and storage of products purchased from Company, said warehouse space to have proper access for a transport trailer.

k. Sell all products purchased from Company at established wholesale prices and in accordance with the Company's established discount policies.

12. In the event Dealer shall breach any terms of this agreement including any of the covenants set forth in Paragraphs 3 and 11 hereof, Company shall give prompt written notice thereof to Dealer and should Dealer fail to remedy said breach or reach an agreement with Company within thirty days after notice from Company, then Company may terminate this agreement on ten days' advance written notice.

13. In the event of termination of this agreement for any reason whatsoever, Dealer agrees to obliterate any and all advertisements and references to Company or

Company's trademarks from his delivery equipment before it is used for any other purpose whatsoever.

14. All private label sales shall be at the sole discretion of the Company.

15. Except as otherwise provided herein, this agreement shall remain in effect for the period of five (5) years from the date hereof and shall be automatically renewed from year to year thereafter provided, however, that either party may terminate this agreement after five (5) years or at the end of any anniversary year thereafter upon ninety (90) days' advance written notice.

16. Company agrees to render the Dealer at no cost to Dealer the various services outlined below:

a. All of Dealer's trucks will be equipped with tray racks at Company's expense.

b. All merchandise ordered by Dealer will be transported on trays.

c. Company will make available to Dealer its regional accounting and vehicular staffs to assist Dealer in setting up an adequate bookkeeping system, a fleet maintenance program and fleet efficiency programs.

d. When possible, Company will assist Dealer in purchasing vehicular equipment and repair parts through Company's suppliers and at Company's price schedules.

e. Company will make available to Dealer one Cake Merchandiser who will devote full time to the development of cake sales in Dealer's territory and the training of Dealer's cake sales supervision. Any display material deemed important for the development of cake sales in Dealer's territory will be furnished by Company at no expense to Dealer.

f. During the first three months of this agreement, Company will make available to Dealer at no cost to Dealer one Bread Sales Merchandiser who will devote his time exclusively to the development of bread sales in Dealer's territory. Thereafter, Company will supply Dealer with bread sales and mer-

chandising assistance when deemed necessary by Company.

g. Company will make its Accounting Department in Denver, Colorado available to the Dealer for the purpose of handling Dealer's Driver Salesman daily settlements and the invoicing of the various charge account customers of Dealer. These accounting services will operate in the following manner:

Each day Dealer's Driver Salesmen will be charged out with the merchandise delivered to him by Dealer at full wholesale price. At the end of each day, each Driver Salesman will turn in to Dealer his stale returns and receive a credit slip therefor. The cash collections, charge slips, stale return slip and a copy of the Salesman's charge out for merchandise that day will be deposited by each Driver Salesman in a locked canvas bag for which each Driver Salesman shall have a key. The various locked bags from the Driver Salesman will be transported by Company to Denver in a vault located in its transport trailer. The bags will be opened by Company's cashier in Denver with duplicate keys in the possession of the cashier only. Company will reconcile Salesman's settlement sheet with the charge out sheet, the credit for stale returns, the cash receipts and the charge tickets and post to the proper ledger accounts.

All cash receipts received from Dealer's Driver Salesman will be credited against amounts due from Dealer to Company for product purchased by Dealer. Copies of the ledger entries and the Driver Salesman reconciliations will be furnished to Dealer within two days.

On Wednesday of each week, Company shall prepare on Dealer's letterhead invoices directed to each of Dealer's charge customers for purchase for the preceding week ending on Saturday plus any outstanding balance. These invoices will be delivered to Dealer by Thursday morning of each week, and Dealer shall, in turn, mail said invoices to its charge customers.

Payment of all invoices will be made to Dealer, but Dealer shall promptly notify Company of any receipts to be posted against the proper ledger account.

Dealer shall be solely responsible for the collection of its accounts receivable and will further be responsible for any Driver Salesman shortages that may occur.

17. Performance of this agreement will be consumated as soon as possible after execution, in any event, within sixty (60) days of the Contract date.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their duly authorized representatives the day and year first above written.

ATTEST: Continental Baking Company

/s/ [Illegible] By /s/ [Illegible]
Secretary Treasurer

ATTEST: Wyoming Baking Company

/s/ [Illegible] By /s/ [Illegible]

STIPULATION EXHIBIT 22A

CONTINENTAL BAKING COMPANY
(INCORPORATED)

Executive Offices

Halstead Avenue
Rye, New York 10580

P.O. Box 731 Telephone (914) 967-4747

October 18, 1966

Carl J. Batter, Jr., Esq.
Compliance Division
Bureau of Restraint of Trade
Federal Trade Commission
Washington, D.C. 20580

Re: Continental Baking Company
Docket No. 7880

Dear Mr. Batter:

Your letter of September 26, 1966, addressed to Mr. Whamond, Secretary of Continental Baking Company has been referred to me for reply. As I indicated to you in my letter of October 11th, it was necessary to obtain this information from our various bakeries throughout the United States due to the fact that most independent dealership arrangements are processed locally.

Attached hereto marked Exhibit "A" is a copy of the map attached to the original contract with the Wyoming Baking Company. Inasmuch as colors are not capable of reproduction, I would like to point out to you the line surrounding Sheridan, Gillette, Douglas, Bairoil and Dubois is the area outlined in red on the original map. The area outlined on your copy by the line surrounding Rawlins, Medicine Bow, and Encampment is the area outlined in blue on the original map.

Performance under our contract with the Wyoming Baking Company commenced on June 13, 1966. Since that time bread sales from our Denver plant to the Wyoming Baking Company have averaged $14,000.00 a week. The actual sales for the weeks ending June 18, 1966 through September 24, 1966, are set forth on Exhibit "B" attached hereto. As for the sales of bread and bread-type rolls by the Wyoming Baking Company during the one year period prior to our contract with them, I must advise that these figures are not available. They would be found only in the corporate records of the Wyoming Baking Company.

At the time Mr. Schafer and I visited with you and Mr. Gercke, I believe I advised you that our contract with the Wyoming Baking Company had been modeled after a standard independent distributor contract which we had developed for our potato chip business. It was on the basis of one of those potato chip contracts that our negotiations were commenced. In our contracts with independent distributors of potato chips, there is a standard provision embodying an option to purchase. For some reason Mr. Sneesby of the Wyoming Baking Company insisted on that clause being in his contract. I have advised you, however, that it is not the intention of Continental Baking Company at any time to exercise that option.

The other dealership contracts we have pertaining to bread and bread-type rolls are on a form contract which is held at each individual bakery. That particular type of contract does not include an option to purchase. I am enclosing a copy of that form contract herewith marked Exhibit "C" to illustrate my point.

Inasmuch as all of our dealership contracts on bread and bread-type rolls, with the exception of the one with the Wyoming Baking Company, are either on an oral basis or written on a contract represented by Exhibit "C", you can understand that we have not exercised any options to purchase dealerships since May 11, 1962, since none existed.

To give you more complete details on our independent distributor business, I am enclosing herewith a schedule marked Exhibit "D" setting forth the name and address of each independent distributor of bread and bread-type rolls in the United States.

I trust that my response gives you all of the information you have requested and will satisfy your questions completely.

Very truly yours,

/s/ Gordon A. Thomas
GORDON A. THOMAS
Associate Counsel
CONTINENTAL BAKING COMPANY

GAT:eb

Enc.

* * * *

STIPULATION EXHIBIT 30

SALES AGREEMENT

Independent Dealer

THIS AGREEMENT made and entered into this day of August, 1966, between CONTINENTAL BAKING COMPANY (hereinafter referred to as "Company") and SHEPPARD BAKING COMPANY of Durango, Colorado (hereinafter referred to as "Dealer").

WITNESSETH

For and in consideration of the mutual covenants of the parties hereto, Company hereby agrees to sell to Dealer, and Dealer agrees to purchase from Company, Dealer's requirements of standard bakery products produced by Company or carried in its line, as they shall be ordered by Dealer from time to time, subject to the following conditions:

1. All products ordered by Dealer will be sold to it f.o.b. Durango, Colorado at Company's prevailing wholesale prices in Durango, Colorado, as they may be from time to time, less a discount of 30% on cake and sweet goods items and a discount of 35% on bread items.

2. Company hereby assigns to Dealer as its exclusive sales territory the area circumscribed in red on the map attached hereto. This assigned territory may be enlarged or limited by the parties upon mutual agreement.

3. (a) Company will deliver products to Dealer daily excepting Sundays and Wednesdays, no later than 5 o'clock A.M. Company shall be excused from this requirement if unable to deliver due to weather or road conditions making such deliveries impractical.

(b) Dealer must pay for all purchases net weekly upon receipt of invoice failing which Company

may suspend deliveries and/or terminate this agreement on three (3) days advance written notice.

(c) Company will accept in payment of invoices cash, cashier checks, or checks drawn on Dealer.

4. Company will supply Dealer at Dealer's expense all special bread and cake display racks ordered by Dealer subject, however, to Company's approval thereof. Dealer will be required to maintain all racks in good merchandising condition.

5. Each account will be served with full rack service with Dealer crediting each account for stale returns and damaged goods. Dealer will be responsible for the expense of all stale returns and damaged goods.

6. Dealer agrees to return to Company from time to time all containers and racks of Company used in the shipment of products to Dealer. Upon termination of this agreement, Dealer will reimburse Company for any shortages in the return of shipping containers and racks at Company's expense.

7. At all times during the term of this agreement, Dealer shall, at its expense, maintain comprehensive general public liability and property damage insurance with an insurance company acceptable to Company naming Company as additional insured. Said insurance shall be written in limits of no less than \$100,000/\$300,000 bodily injury and \$25,000 property damage. A certificate evidencing said coverage shall be delivered to Company on demand.

8. The obligation of Company to deliver products to Dealer and Dealer's obligation to purchase its requirements of products from Company shall be subject to interruption or delays caused by strikes, labor difficulties, acts of God, equipment failure, and casualties not within the control of the parties hereto.

9. In the event the dealership is sold to a third party, this contract will continue in effect as to said

third party provided it shall meet Company's credit requirements.

10. Dealer covenants and agrees as follows:

a. To service all accounts in his territory as often as may be necessary to develop maximum sales, but at least once a day excluding Sundays.

b. To install and maintain point of purchase material, supplied by Company at its expense, in accordance with the recommendations of Company and in amounts adequate to insure maximum sales and advertising benefit from promotional programs.

c. To conform to Company's code requirements for the age of products purchased from Company and sold to Dealer's accounts.

d. To sell in its territory only products carried by Company in its line or those for which Dealer obtains prior written approval from the Company.

e. To keep and maintain route books containing the name, address, and weekly purchases of each account in Dealer's territory. These route books shall be deemed an asset of the dealership and shall be transferred with the dealership in accordance with the provisions of this agreement.

f. To operate and maintain in a safe and sanitary condition delivery trucks adequate to properly sell and service all accounts in the territory.

g. To comply at all times with any applicable Federal, State or Local Food and Drug Laws and Regulations.

h. To maintain, at Dealer's expense, sanitary warehouse space for the receipt and storage of products purchased from Company, said ware-

house space to have proper access for a transport trailer.

i. Sell all products purchased from Company at established wholesale prices and in accordance with the Company's established discount policies.

j. Install tray racks in Dealer's delivery trucks at Dealer's sole expense.

11. In the event Dealer shall breach any terms of this agreement including any of the covenants set forth in Paragraphs 3 and 10 hereof, then Company may terminate this agreement on ten days' advance written notice.

12. In the event of termination of this agreement for any reason whatsoever, Dealer agrees to obliterate any and all advertisements and references to Company or Company's trademarks from its delivery equipment before it is used for any other purpose whatsoever.

13. Except as otherwise provided herein, this agreement shall remain in effect for the period of five (5) years from the date hereof and shall be automatically renewed from year to year thereafter provided, however, that either party may terminate this agreement after five (5) years or at the end of any anniversary year thereafter upon ninety (90) days' advance written notice.

14. Company agrees to render to Dealer at no cost to Dealer the various services outlined below:

(a) Company will give Dealer technical assistance and instruction for the design and installation of tray racks in Dealer's delivery trucks.

(b) All merchandise ordered by Dealer will be transported on standard transport trays and racks.

(c) Company will make available to Dealer 36 man days of sales service during each year of

this agreement for the development of bread, sweet goods and cake sales in Dealer's territory and the training of Dealer's sales supervision.

(d) Company will install transport unloading door in Dealer's warehouse in Durango, Colorado, will supply on a loan basis a power ramp for unloading transport racks and will do any necessary preparation of the drive area for parking a transport trailer.

(e) Company will supply Dealer, on a loan basis, with 20 backroom racks for the storage of bakery products in grocery stores together with one hand dolly for each route operated by Dealer.

(f) Company will maintain the paint on all Dealer's route trucks and will supply Wonder Bread and Hostess Cake truck decals, all at Company's expense.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their duly authorized representatives the day and year first above written.

ATTEST: CONTINENTAL BAKING COMPANY

[Illegible] By /s/ Herbert Van Wyk
HERBERT VAN WYK

ATTEST: SHEPPARD BAKING COMPANY
/s/ Melvin C. Hebert
MELVIN C. HEBERT

* * * *

STIPULATION EXHIBIT 34A

CONTINENTAL BAKING COMPANY
(INCORPORATED)

Executive Offices

Halstead Avenue
Rye, New York 10580

P.O. Box 731 Telephone (914) 967 4747

January 3, 1966

Joseph J. Gercke, Esq.
Chief, Compliance Division
Bureau of Restraint of Trade
Federal Trade Commission
Washington, D.C.

Re: Continental Baking Company
Docket No. 7880

Dear Mr. Gercke:

This is in response to your letter of May 24, 1966 requesting that I amend my annual letter reporting compliance during the prior year, which was dated January 3, 1966, and also supply certain information respecting the Mack Baking Company of Bangor, Maine. In accordance with the numbered paragraphs of your letter the information requested concerning Mack is as follows:

(1) Continental does supply bread and bread-type rolls to Mack. Continental became a supplier of Mack so many years ago that no one now can accurately state when that relationship began. Beginning on or about April 10, 1965 Continental began supplying Mack under the terms of a letter agreement, a copy of which is enclosed. It is not possible to state the quantities delivered to Mack on an average daily, weekly and monthly basis, or on any other basis, between May 11, 1962 and April 1965. Since April 11, 1965 Continental has sold to Mack an average of $58,838 per month. This figure, however, includes cake and sweet goods products. Bread

products supplied Mack have been produced at the following Continental plants: Holyoke and Natick, Massachusetts; and New Haven and East Hartford, Connecticut. We are informed that Mack also purchases bread and bread-type roll products from the De Lordge Baking Company and also from a retail baking company in Bangor. Mack distributes its products in the same manner as any wholesale bakery or wholesale distributor. It sells restaurants, grocery stores and institutions. Its distribution system is 100 per cent owned by Mack. The products are distributed under Continental's trade name "Wonder" and also under the trade names "Sunbeam" and "Mack's", both of the latter two being owned by Mack.

2. Mack does not now produce any bread or bread-type rolls.

3. Mack did at one time produce such products, and terminated production on or about April 10, 1965. We have no knowledge of the quantities produced by Mack in the preceding one-year period, or any other time.

4. Continental did not acquire any right, title or interest in any of Mack's assets.

5. Continental has made no payments of money to Mack.

6. In the Bangor area the standard size loaf of bread is the one-pound 4-ounce loaf. This sells at 24.5 cents wholesale and 31 cents retail.

Neither in the past year, nor at any time since May 11, 1962 has Continental acquired any assets of any company engaged in the production and sale of bread or bread-type roll products.

Continental has no reason to request that this report be given a confidential clarification under Section 1.132 (6) of the Commission's Rules.

Very truly yours,

/s/ William J. Whamond
WILLIAM H. WHAMOND
Secretary
CONTINENTAL BAKING COMPANY

WJW:mz

STIPULATION EXHIBIT 35

CONTINENTAL BAKING COMPANY
(INCORPORATED)

Executive Offices

Halstead Avenue
Rye, New York 10580

P.O. Box 731 Telephone (914) 967-4747

January 3, 1967

Joseph J. Gercke, Esq.
Chief, Compliance Division
Bureau of Restraint of Trade
Federal Trade Commission
Washington, D.C. 20025

Re: Continental Baking Company
Docket No. 7880

Dear Mr. Gercke:

This will supplement through to the year end our recent communications with you concerning compliance. Continental has not purchased either directly or indirectly the stock or assets, or any part thereof, of any company engaged in the production and sale of bread and bread-type rolls.

We understand that recently Mr. Lars Janson of your staff has been interviewing some of our distributors in the western states. This causes us some surprise, both because whatever he wants to know is available from us, and because it suggests that you see something in our acquisition of new distributors which is inconsistent with our cease and desist consent order.

Particularly in the western states where distances between plants and markets are apt to be so great, we rely very heavily upon independent distributors to obtain ade-

quate distribution of our products. In some plants the percentage handled by independent distributors is about fifty per cent. New distributorships are continually being added, while existing distributorships are sometimes abandoned and sometimes are sold by the distributor to another distributor with, of course, our consent. Occasionally, as in Missoula, we acquire the distribution assets of an independent distributor. As was the case there, this usually occurs because the distributor wants to be relieved of the problems of running an independent business and wishes, instead, to become an employee of Continental, thereby obtaining pension rights and other benefits. Such acquisitions of course do not require Commission approval because the distribution assets acquired are not acquired from a company engaged in the production of bread and bread-type rolls.

Occasionally we add on a new independent distributor who was himself up to that time engaged in the production and sale of his own bread products. When such an individual decides to discontinue production (usually because the small operations are increasingly uneconomical), he will attempt to find some other company to supply him with products if he desires to remain in the business of distributing bakery products at wholesale. The usual source of supply is from a company not then engaged in the distribution of bread products in his market area—those companies which are competing with that company are apt to decline to supply him and instead try to secure the business for themselves. This was the situation in both Durango and Casper. In both of these markets Continental was not engaged in the distribution of bread and bread-type roll products. For both of these companies Continental was the most feasible supplier and probably if Continental had not agreed to supply them as distributors they would not have been able to stay in the wholesale bakery business.

Since distribution arrangements such as these are very common in the industry, both for Continental and for other wholesale bakers, the terms of the arrangements are quite standard and not subject to any substantial

bargaining. Independent distributors are charged the wholesale plant price as it may fluctuate from time to time, less a percentage discount. No changes in the distributor's distribution area are contemplated, and it is understood that the distributor will be exclusive in his area. The distributor retains complete control over his route structures and employees. There are no changes in his customer list, and he is expected to use his best efforts to develop the business and add new customers. In that regard he has independent control over the amounts spent for his own advertising and other promotional efforts. The distributors maintain control over their own retail prices, as well as credit terms they may choose to grant to their customers. Selection of which Continental varieties, and the amounts of each which are to be marketed, is entirely up to the business judgment of the distributor. The independent distributors also maintain ownership and control over their own distribution equipment, maintenance facilities, warehouse and distribution facilities, methods of accounting and financial records, etc. They remain, in short, individual entrepreneurs.

We trust this letter meets with the additional information you have requested.

Very truly yours,

CONTINENTAL BAKING COMPANY

/s/ Roy M. Anderson
ROY M. ANDERSON
Vice-President and General Counsel

RMA:eb

Subscribed and sworn to before me this 3rd day of January, 1967.

/s/ Ethel O. Becker
Notary Public

ETHEL O. BECKER
Notary Public, State of New York
No. 60-0212260
Qualified in Westchester County
Term Expires March 30, 1967

STIPULATION EXHIBIT 36

Aug. 2, 1968

Honorable Ramsey Clark,
The Attorney General,
Department of Justice,
Washington, D.C. 20530

Re: Continental Baking Company,
FTC Docket No. 7880.

My dear Mr. Attorney General:

Pursuant to the provisions of Section 16 of the Federal Trade Commission Act, the Commission hereby certifies the facts of violations of its consent order to divest and to cease and desist in the above-captioned matter.

The Commission has reason to believe, in certifying these facts, that Continental Baking Company has violated and is continuing to violate the said order's prohibition against making acquisitions, and therefore recommends that appropriate proceedings be instituted for the recovery of civil penalties, as provided for in Section 11(1) of the Clayton Act and Section 5(1) of the Federal Trade Commission Act, and certain injunctive relief.

The proposed suit results from original proceedings instituted by the Commission under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act against Continental Baking for its acquisitions of certain competitors engaged in the production and sale of bread and bread-type rolls. Defendant consented to the entry and issuance of the order herein, by the Commission on May 11, 1962, which, among other things, prohibits Continental Baking for a period of ten years from acquiring any interest in any concern producing and selling bread and bread-type rolls without prior Commission approval.

The recommended suit charges defendant with making separate acquisitions of all or a part of the assets of three independent bakery concerns located, respectively, in Missoula, Montana; Casper, Wyoming and Durango,

Colorado. Prior Commission approval was not requested by defendant before making such acquisitions, and the Commission has not given any such approval. The acquisitions followed a common pattern whereby the independent bakery companies, pursuant to agreements and arrangements with defendant, terminated the production of bread and bread-type rolls under their own labels and immediately commenced to distribute bread and bread-type rolls produced by the defendant under defendant's labels to customers and in sales areas formerly supplied with products produced by the independent bakeries. With the change over and thereafter, defendant made a full or partial acquisition of tangible and intangible assets from these independent concerns. In the case of the Missoula bakery, defendant over a one-year period acquired not only the good will, sales routes and customer lists, but actually took over accounts receivable, trucks and other physical assets of this bakery. In the case of the Casper, Wyoming bakery, the defendant acquired only a part of the assets and arranged through a third party to take over the operating structure of this bakery. The acquisition of Durango bakery also consisted of a partial take over of tangible assets. These acquisitions by defendant violated and are continuing to violate the Commission's order, which prohibits defendant ". . . from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern . . . engaged . . . in the production and sale of bread and bread-type rolls . . ."

Transmitted herewith are the following:

1. Original and six (6) copies of the draft complaint.

2. Original and three (3) copies of the trial memorandum in support of the complaint, to each of which is attached copies of the following:

   a. Documentary Exhibits Nos. 1 through 23.
   b. Investigational Hearing Transcripts No. 1 and No. 2.
   c. Investigational Reports Nos. 1 through 3.

The Commission would appreciate being advised as to when and where this recommended case may be filed. Also, we will be pleased to furnish any assistance that may be necessary or useful for the processing and filing of this civil penalty action. Commission attorneys who are familiar with the facts of this case will be made available for assisting and working with the United States Attorney in his preparation and trial of this suit.

By direction of the Commission.

PAUL RAND DIXON
Chairman

Enclosures.

EGGruis:dg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-1220

UNITED STATES OF AMERICA, PLAINTIFF

v.

ITT CONTINENTAL BAKING COMPANY, DEFENDANT

SUPPLEMENTAL STIPULATION

It is hereby stipulated and agreed by and between the undersigned attorneys for Plaintiff and Defendant respectively, that:

1. Stipulation Exhibit 33 attached to the Stipulation dated December 1, 1970, should be replaced by the attached new Stipulation Exhibit 33, letter, dated January 3, 1966, from William J. Whamond, Secretary, Continental Baking Company, to Joseph W. Shea, Secretary, Federal Trade Commission.

2. The attached letter, dated February 4, 1965, from Hollis H. Sims, Vice President, Continental Baking Company, to Mack Baking Company, a copy of which was enclosed with the letter identified as Stipulation Exhibit 34A, should be added to the Stipulation dated December 1, 1970, as Stipulation Exhibit 34C.

/s/ James E. Corkey
Of Counsel

/s/ Carolyn J. McNeill
Attorney for Plaintiff

/s/ John H. Schafer
Of Counsel

[Illegible]
Attorney for Defendant

Dated: February 1971

Approved: ______________________
U.S. District Judge

Dated: ________________, 1971

STIPULATION EXHIBIT 34C

CONTINENTAL BAKING COMPANY
(INCORPORATED)

Executive Offices

Halstead Avenue
Rye, New York

P.O. Box 731 Telephone WOodbine 7-4747

February 4, 1965

Mack Baking Company
104 Center Street
Bangor, Maine

Gentlemen:

This will confirm arrangements made with you whereunder we agree to sell to you and you agree to purchase from us various bakery products produced by us under our various advertised brands. This arrangement will be subject to the following terms and conditions:

1. All products delivered to you pursuant to orders placed by you from time to time will be delivered daily by our own transport trailer F.O.B. your plant in Bangor, Maine.

   Products will be shipped in nesting wire baskets for which we will charge you at the rate of $3.00 for each basket. Empty baskets will be returned to us daily for which you will be allowed a credit of $3.00 each. Said wire baskets will be depreciated by us on a two year basis. In the event you should for any reason discontinue purchasing products from us pursuant to this contract within two years from the date hereof you agree to purchase said wire baskets from us at that time at our then book value.

2. Products covered by this agreement will carry our various regular brand names and will include bread, buns, cake, sweet goods and donuts. You agree to pay for said products at our prevailing plant wholesale prices less 38-½% discount in the case of bread and buns and less 30% discount in the case of cake, sweet goods and donuts. These discounts may be adjusted by us in the event your weekly volume of purchases drops below an average of $15,000.00 per week, computed at regular wholesale prices, over a period of four (4) consecutive weeks.

   In the event we should elect to adjust a discount rate, we will give you one (1) month's written notice of the change and should you not desire to make purchases under said revised discount rates, you may terminate this agreement on the effective date of the change by giving us at least three (3) weeks' advance written notice of termination.

3. Products sold by us will be billed to you weekly on each Saturday and payment of said invoices must be received by us no later than the following Saturday at our Natick plant.

4. We agree to sell to you at our cost any advertising truck decals and point-of-purchase materials carried by us in inventory.

   It is further agreed that you may order our standard advertising commercials whether radio, newspaper or television from Ted Bates Advertising Agency for which you will pay said Agency the standard media costs plus the Agency fee (15%). No charge will be made to you for the production costs in creating the advertising.

5. In consideration of your purchases from us, we agree to refrain from selling any bakery products under our regular advertised brands to any other person, firm, or corporation for re-sale in the following territory in which you will have said exclusive rights: The territory outlined in red represents the present exclu-

sive territory. The territory outlined in blue represents exclusive territory to be acquired at the option of Mack Baking Company.

In consideration for this exclusive arrangement, you agree not to handle any bakery products other than those produced by you or sold to you by us pursuant to this contract.

6. In case that any advertising pertaining to our products be placed on any of your delivery equipment, you agree to obliterate all such advertisements before such delivery equipment is used for any purpose other than in connection with the sale of our products.

7. This agreement shall remain in effect for the period of five (5) years from the date hereof and shall be automatically renewed from month-to-month thereafter unless or until termination by either party on at least six (6) months' advance written notice.

8. It is agreed that this contract shall not be assigned by you without our prior written consent.

Please signify your acceptance of the above terms and conditions by signing and returning the copy of this letter attached hereto.

Very truly yours,

CONTINENTAL BAKING COMPANY

By /s/ Hollen H. Sims
HOLLEN H. SIMS
Vice-President

ACCEPTED:

MACK BAKING COMPANY

By—[Illegible]

Date—February 9, 1965

SUPREME COURT OF THE UNITED STATES

No. 73-1290

UNITED STATES, PETITIONER

v.

ITT CONTINENTAL BAKING COMPANY

ORDER ALLOWING CERTIORARI—Filed April 29, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 547816 262

INDEX

532-358—74——1

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ITT CONTINENTAL BAKING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review that portion of the judgment of the Court of Appeals for the Tenth Circuit which held that respondent's acquisitions in violation of a Federal Trade Commission order are "single" violations of the order under the civil penalty provisions of the Clayton and Federal Trade Commission Acts (15 U.S.C. 21(*l*) and 45(*l*)), rather than "continuing" violations for each day respondent continues to hold the unlawfully acquired assets.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1A–10A) is reported at 485 F. 2d 16. The district court's findings of fact and conclusions of law (App.

C, *infra,* pp. 12A–16A; 1972 CCH Trade Cases, ¶73,993) are not officially reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* p. 11A) was entered on September 24, 1973. On December 17, 1973, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including January 22, 1974. On January 14, 1974, Mr. Justice White further extended the time within which to petition to and including February 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a firm which violates a Federal Trade Commission consent order prohibiting acquisitions is subject, under the civil penalty provisions of the Clayton and Federal Trade Commission Acts (15 U.S.C. 21(*l*), 45(*l*)), to the imposition of daily penalties for each day it continues to hold the unlawfully acquired assets.

STATUTES INVOLVED

Section 11(*l*) of the Clayton Act (38 Stat. 734, as amended, 15 U.S.C. 21(*l*)) provides:

> Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be

> recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.

Section 5(*l*) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45(*l*)) provides:[1]

> Any person, partnership, or corporation who violates an order of the Commission [to cease and desist] after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission, each day of continuance of such failure to obey or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropri-

[1] Subsequent to the decision below, Congress amended Section 5(*l*) of the Federal Trade Commission Act by increasing the amount of the maximum civil penalty for each violation of a Commission order from $5,000 to $10,000, and by expressly empowering district courts to grant equitable relief in civil penalty cases. P.L. 93-153, Section 408(c), 87 Stat. 591.

ate in the enforcement of such final orders of the Commission.

STATEMENT

1. THE FTC PROCEEDINGS AND CONSENT ORDER

In 1960 the Federal Trade Commission issued an administrative complaint (App. 57a–67a)[2] charging, *inter alia,* that acquisitions of several baking companies by Continental Baking Company ("Continental") violated Section 7 of the Clayton Act (38 Stat. 731, as amended, 15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45). The complaint alleged that the aquisitions "substantially lessened actual and potential competition throughout the country in the manufacture, sale and distribution of bread;" "eliminated [the acquired firms] as independent competitive factors in the manufacture, sale and distribution of bread;" and "significantly increased the trend to industry-wide concentration of the manufacture and sale of bread" (App. 63a).

Two years later, while the proceeding was still before an examiner, Continental and FTC complaint counsel agreed (App. 68a–78a) to a proposed consent order. This proposal, which the Commission subsequently adopted without change, prohibited Continental for 10 years "from acquiring, directly or indirectly, * * * the whole or any part of the stock, share capital, or assets of any concern * * * engaged * * *

[2] "App." refers to the appendix filed in the court of appeals, a copy of which is being lodged with this Court.

in the production and sale of bread" without the Commission's prior approval.[3]

The order also required Continental to divest itself of one of the baking firms it had acquired. Continental complied with that provision, and it is not involved in this case.

In an appendix incorporated into their agreement the parties stated that "[o]ne of the principal problems in the baking industry is the tendency towards concentration and the continuous growth of major baking companies through acquisition. Such acquisitional growth and tendency towards concentration places in the hands of a few large companies the means to set the pattern of competition, not only among themselves, but also for all local baking companies serving any given area" (App. 78a). If the proposed order were adopted, the parties said, Continental's "alleged continuous practice of acquiring companies baking and selling bread * * * will be brought to a halt * * *" (*ibid.*). It was also agreed

[3] The section of the order barring acquisitions provides in full (App. 83a):

"IT IS FURTHER ORDERED that for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order, permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission."

that the "complaint may be used in construing the terms of the order" (App. 69a).

As recommended by the hearing examiner (App. 79a–84a), the Commission, in May 1962, approved the agreement and adopted the consent order (App. 22a–23a).

2. THE COURT PROCEEDINGS

After the cease and desist order became final, Continental, without obtaining the Commission's prior approval, entered into agreements with three independent producers and sellers of bread by which Continental acquired their market share or sales volume. In December 1968, pursuant to the Commission's recommendation, the United States brought this proceeding under Section 11(*l*) of the Clayton Act and Section 5(*l*) of the Federal Trade Commission Act, alleging that Continental's agreements with the three local bakeries violated the order's ban on acquisitions.[4] The complaint (App. 5a–12a) sought civil penalties of $1,000 per day from the date of each acquisition to the date the complaint was filed, an injunction commanding future compliance with the order, and such further relief as the court deemed appropriate (the government later specifically requested divestiture (App. 135a)).

[4] In September 1968, shortly before the complaint was filed, Continental merged with International Telephone and Telegraph Corporation ("ITT"). Pursuant to the merger agreement Continental ceased to exist, and its business has since been conducted by ITT Continental, a wholly-owned subsidiary of ITT, created for that purpose (App. 23a–25a). The suit was therefore brought against ITT Continental Baking Company ("ITT Continental").

The case was submitted to the district court upon the parties' stipulation of facts (App. 19a–56a). The court held that Continental's transactions with two of the three firms constituted acquisitions prohibited by the order, but that its transactions with the third firm did not (App. C, *infra,* pp. 14a–15a).

The district court denied the government's prayer for assessment of daily penalties. It concluded "that the terms of the consent order proscribe only the act of acquisition and that the violations of the consent order * * * did not constitute a 'continuing failure or neglect to obey' said order [within the meaning of the civil penalty statutes]. * * * Once these two acquisitions were accomplished, the violations were complete" (App. C, *infra,* p. 15a).[5]

[5] Other issues presented to the district court were whether the Commission is required to notify a person subject to an order that it is in violation of the order before continuing penalties may be imposed; whether the district court had the power to grant injunctive relief in a civil penalty proceeding; and whether ITT Continental is a "successor" to Continental and assumed Continental's liabilities under the order (see App. 134a–136a).

Since the district court ruled that the violations were not continuing, it did not rule on the notice issue, but expressed the view that it would seem unreasonable for the Commission knowingly to permit daily penalties to accrue without giving notice of its position (App. C, *infra,* p. 15a).

The court held that it had the power to grant equitable relief (*id.*, at pp. 15a–16a). As noted above (*supra*, n. 1), Congress has since expressly authorized district courts to grant such relief in Section 5(*l*) civil penalty actions.

Finally, the court ruled that ITT Continental is a successor of Continental and that ITT Continental "assumed the liabilities of Continental Baking Company including the liabilities under the Federal Trade Commission consent order" (App. C, *infra*, p. 16a).

532-358—74——2

The court imposed the maximum single civil penalty of $5,000 for each of the two "separate" violations it found, and entered an injunction commanding ITT Continental to comply with the terms of the consent order until it expired[6] (App. C, *infra*, p. 16A; App. D, *infra*, p. 17A). It declined, however, to order divestiture of the assets ITT Continental acquired in violation of the order.

Both parties appealed. The court of appeals reversed the district court's ruling that Continental's transactions with the third firm did not constitute an acquisition in violation of the order and remanded the case to the district court for the imposition of an appropriate "single" civil penalty for that violation. It affirmed in all other respects.

In affirming the district court's ruling that the prohibited acquisitions constituted single, rather than continuing, violations of the order, the court of appeals held, citing *United States* v. *Armour & Co.*, 402 U.S. 673, that the scope of a consent decree must be discerned within its "four corners" (*id.* at 682), and that the decree must be construed "as it is written" (*ibid.*). Under this standard, the court of appeals reasoned, the order must be construed as prohibiting only the "act" of acquisition, and not the continued reten-

[6] The consent order was scheduled to expire by its own terms on May 15, 1972, and the district court's injunction ran only until that date.

In April 1972, the Commission issued an order requiring ITT Continental to show cause why the order's ban on acquisitions should not be extended until April 1977. On December 12, 1973, following hearings, the administrative law judge filed an opinion recommending that the ban on acquisitions be extended to April 13, 1977.

tion of assets acquired contrary to its terms (App. A, *infra*, pp. 8A–9A).

REASONS FOR GRANTING THE WRIT

This case presents a question of basic importance to the enforcement of Federal Trade Commission orders barring future acquisitions. Some 66 Commission orders now in force bar acquisitions in language similar to the language of the order in this case. By eliminating the risk that violations of these non-acquisition orders may result in the imposition of substantial civil penalties, the court of appeals' ruling removes the most effective incentive for compliance, and converts the prohibition against futher acquisitions into a minor additional cost of acquisition (with, at the least, an opportunity to divest without further sanction) after the violator is detected, sued and enjoined. This ruling is inconsistent with the purpose of the Wheeler-Lea and Clayton Finality Act Amendments, and the only other court which has considered the same question has ruled to the contrary.[7] Plenary review is therefore warranted.

1. In order to limit trends towards concentration it perceived as resulting or likely to result, from acquisitions in particular industries, the Commission has in recent years included in its orders in appropriate cases provisions barring further acquisitions (usually for a limited period), unless the firm sub-

[7] In *United States* v. *Beatrice Foods Co.*, 351 F. Supp. 969 (D. Minn.), appeal pending, C.A. 8, No. 73–1120, the district court imposed a civil penalty of $200 per day (for a total penalty of $156,400; *id.* at 971) for an acquisition prohibited by a Commission consent order similar to the order in this case. The non-acquisition provision involved in that case is set forth in the district court's opinion on liability, 344 F. Supp. 104, 107.

ject to the order obtains the Commission's prior approval. These remedial provisions have two broad purposes which supplement the Commission's authority to enforce the antitrust laws: (1) they permit the Commission to withhold approval of particular acquisitions inconsistent with the remedial purposes of the order, even though, if viewed separately, the acquisitions might not themselves violate the antitrust laws;[8] and (2) they eliminate the problems that inhere in divestiture proceedings by affording the Commission an opportunity to assess the competitive effects of a proposed acquisition before it is consummated.

As noted above, there are currently in effect 66 Commission orders which bar future acquisitions, but which, like the order in this case, do not expressly bar the "holding" of stock or assets acquired in violation of their terms (App. E, *infra*, pp. 18A–22A). Fifty-four of these are consent orders of which 27 have at least five more years to run.

If these orders are construed as prohibiting only the "act" of acquisition, but not the "holding" of unlaw-

---

[8] As their terms make plain, the Commission's non-acquisition orders do not prohibit absolutely all acquisitions by the firms subject to them. Thus, in *In the Matter of Beatrice Foods Co.*, 67 F.T.C. 473, 731, n. 48, a proceeding which resulted in the entry of a non-acquisition consent order similar to the order in this case, the Commission explained that:

"* * * an order forbidding future acquisitions without prior approval by the Commission is in no sense an absolute ban on such acquisitions. In deciding whether or not to approve a proposed acquisition submitted under such an order, the Commission is not free to act capriciously or unreasonably. It may deny approval only where the acquisition, if consummated, would conflict with the remedial objectives of the order."

fully acquired stock or assets, their efficacy will be greatly diminished, and the remedial purposes for which they were designed will be correspondingly undermined. For the firms subject to these orders would risk only a maximum civil penalty of $10,000 for a "single" violation and possible divestiture for making a prohibited acquisition. Thus, the ruling below, by removing the threat that prohibited acquisitions may result in substantial civil penalties, effectively encourages firms subject to non-acquisition orders to risk a civil penalty action, rather than comply, where potentially profitable acquisitions are involved.[9] The court of appeals' ruling thus threatens seriously to impair the effectiveness of a large number of outstanding orders.

The possibility that a district court may exercise its equitable power to order divestiture in a civil penalty proceeding, a power which Congress made explicit in the recent amendment of the Federal Trade Commission Act (see, *supra,* n. 1), is insufficient to achieve the deterrence attending the threat of substantial monetary penalties for a prohibited acquisition. Events subsequent to an unlawful acquisition sometimes make divestiture impractical and divestiture is often long delayed. But more important, the purpose of Congress in backing Commission orders with substantial monetary penalties was to deter violations by making them very costly. The possibility that a successful civil

[9] The Commission's rules provide that upon request, the Commission will advise a party whether a proposed course of action would comply with an order. 16 C.F.R. 3.61(d). Under the court of appeals decision, however, there would be no incentive to request such a ruling.

penalty action for an unlawful acquisition may result in a nominal penalty together with an order of divestiture is obviously no substitute, in deterrent effect, for the possibility that a prohibited acquisition may cost up to $10,000 per day from the time it is made until the properties are divested.[10] And, as we shall now show, properly construed, the non-acquisition order in this case, and others like it, prohibit not only the "act" of acquisition but also the continued retention of properties acquired in contravention of the order's terms.

2. The only reason for barring an acquisition is to prevent its effects; for competitive purposes there is nothing intrinsically wrong with the "act" of acquisition in and of itself. Thus, it is the anticompetitive effects of certain acquisitions which lead to their proscription under Section 7 of the Clayton Act (15 U.S.C. 18).[11] The anticompetitive effects of acquisitions condemned by Section 7 result from the fact that by holding the stock or assets, the acquiring firm changes the competitive structure of the industry.

---

[10] The size of the penalties to be imposed is within the informed discretion of the district court, but may not exceed the statutory maximum. As the district court observed in the *Beatrice Foods* case (see, *supra*, n. 7): "Penalties could range * * * from $5,000 [now $10,000] a day down to zero or $1.00 a day." 322 F. Supp. 139, 141.

[11] Section 7 provides, in part, that:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

It is the permanent or continuing effects of prohibited acquisitions which Congress sought to prevent in the statute, and which the parties similarly sought to prevent in this case by adopting a consent order which, like Section 7, prohibits certain acquisitions for the express purpose of preserving competition. Specifically, the parties here, as we have noted (Statement, *supra,* p. 5), pointed in their agreement to the effects of acquisitions in the bread industry—the trend toward concentration resulting from acquisitions—as a problem which would be eliminated so far as Continental was concerned if the Commission adopted the proposed order (App. 78a). In this context, we submit, it frustrates the basic purpose of the order to conclude, as did the court of appeals, that the term "acquisition" in the order does not embrace the retention of the assets illegally acquired.

Indeed, this Court has held that Section 7 is a ban on the relationship an acquisition creates, rather than merely a ban on the "act" of acquisition. In *United States* v. *du Pont & Co.,* 353 U.S. 586, the Court held that the legality of du Pont's acquisition of General Motors' stock should be determined by assessing its effects at the time the government brought suit (1949) rather than at the time of acquisition (1917–1919). In so holding, the Court expressly rejected the argument that "the Government could not maintain this action in 1949 because § 7 is applicable only to the acquisition of stock and not to the holding or subsequent use of the stock" (353 U.S. at 596–597). It explained that the argument was misconceived because the aim of Section 7 "was primarily to arrest appre-

hended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition * * *" (*id.* at 597).[12] Significantly, the Court issued its ruling over a strong dissent which argued that the majority had amended Section 7 to prohibit the acquisition and continued holding of stock. The dissent asserted that "[t]he offense described by § 7 is the acquisition, not the holding or the use, of stock. When the acquisition has been made, the offense, if any, is complete" (*id.* at 620). This limited construction of Section 7, which the Court rejected, is identical to the district court's construction of the order in this case ("Once these two acquisitions were accomplished the violations were complete") which the court below endorsed (App. A, *infra,* pp. 8A-9A).

In rejecting the government's contention that the order here, like Section 7, bars the relationship or effects of prohibited acquisitions, rather than merely the "act" of acquisition, the court of appeals relied solely on *United States* v. *Armour & Co.,* 402 U.S. 673. But *Armour* does not support this overly literal construction of the order at issue here. In *Armour* the government claimed that the purpose of the consent decree was to provide a complete structural separation between the defendant meatpackers and retail food firms which would be frustrated by the acquisition of a defendant meatpacker (Armour) by a

---

[12] As the Second Circuit observed in another context: "what was unlawful was du Pont's status as stockholder in General Motors, and that status continued until divestiture." *Gottesman* v. *General Motors Corp.,* 414 F. 2d 956, 965.

firm engaged in the retail food business (Greyhound). The Court rejected that contention because it found particular provisions in the decree which were inconsistent with such a complete structural separation (see 402 U.S. at 677–680). Having made that determination, the Court responded to the government's argument that Greyhound's acquisition of Armour would frustrate the purposes of the original litigation against the meatpackers. Since it is a bargain between opposing parties, the Court stated, "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it"; it "must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation" (*id.* at 682).

By contrast, there is nothing in the consent order at issue here which is inconsistent with the construction the government urges. In addition, both the complaint (App. 62a–63a), which the parties agreed could be referred to in construing the order (App. 69a), and the agreement containing the proposed order (App. 78a), speak of acquisitions as increasing the trend toward industry-wide concentration, clearly indicating that it was the effects of acquisitions which the parties sought to prohibit, rather than just the "act" of acquisition.

Moreover, implicit in the court of appeals' reliance on *Armour* is the proposition that the Commission did not have the "bargaining power" (see *Armour, supra,* 402 U.S. at 681) to include in the consent order a sep-

532-358—74——3

arate ban on "holding" unlawfully acquired assets. Had a separate express ban on "holding" unlawfully acquired properties been included in some prior Commission orders barring future acquisitions, this proposition might have some force. But the technical and artificial distinction between "acquiring" and "holding" is not reflected in any Commission order, whether entered after litigation or by consent. So far as we are aware, no Commission order barring future acquisitions also expressly bars the "holding" of properties acquired in violation of the order.

A ruling that an acquisition prohibited by a Commission order subjects the acquiring firm to sanctions for each day it retains the assets would be consistent with the basic purpose of the civil penalty provisions to "enforce obedience to the Commission's orders to cease and desist." H. Rep. No. 1613, 75th Cong., 1st Sess., p. 4. Under the wording of these provisions, in light of their legislative history, it is clear that failure to comply with an order requiring divestiture is a "continuing failure or neglect to obey" the order, and that "each day of continuance of such failure or neglect shall be deemed a separate offense" (15 U.S.C. 21(*l*), 45(*l*); *i.e.,* failure to comply with a divestiture order subjects a respondent to a maximum civil penalty of $5,000 (now $10,000) per day. The House Report on the bill which in 1959 added the remedial provision to the Clayton Act (15 U.S.C. 21(*l*)), in virtually the same terms as it appeared in the Federal Trade Commission Act (15 U.S.C. 45(*l*)),[13] stated that

[13] The Wheeler-Lea Act of 1938 (52 Stat. 111) amended generally the review and enforcement procedures of the Federal

"unless the maximum penalty applied and each day of a continuing violation considered [sic] a separate offense, an order dissolving an unlawful merger could be ignored after the mere payment of a $5,000 fine." H. Rep. No. 580, 86th Cong., 1st Sess., p. 7. Similarily, unless a prohibited acquisition is likewise deemed a continuing failure to obey the order proscribing it, the order could be effectively ignored, for the firm subject to it would risk only a nominal monetary penalty and the possibility of divestiture for a violation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Robert H. Bork,
Solicitor General.
Thomas E. Kauper,
Assistant Attorney General.
Howard E. Shapiro,
George Edelstein,
Attorneys.

February 1974.

Trade Commission Act. Under the 1938 Act, after a cease and desist order becomes final as provided in the statute, a violation of the order subjects the respondent to a civil penalty of not more than $5,000 (now $10,000). The provision declaring each day's non-compliance a separate offense was added to the Trade Commission Act in 1950. 64 Stat. 20. The Clayton Finalty Act of 1959 (73 Stat. 242) amended the review and enforcement procedures for Commission orders issued under the Clayton Act to conform to the parallel provisions of the Trade Commission Act. See *Federal Trade Commission* v. *Jantzen, Inc.*, 386 U.S. 228.

[fi]gures the maximum penalty applied and each day of a continuing violation constituted [sic] a separate offense, an order dissolving an unlawful merger could be obtained after the mere payment of a $5,000 fine. [illegible] Now, the 1950 [illegible] makes a prohibited acquisition [illegible] a continuing failure to obey the order [illegible] the order could be effectively enforced, for the fines [illegible]

[illegible]

APPENDIX A

United States Court of Appeals Tenth Circuit
Nos. 72–1072–73–September 1973 Term

UNITED STATES OF AMERICA, APPELLANT

v.

ITT CONTINENTAL BAKING COMPANY, APPELLEE

Appeal From the United States District Court for the District of Colorado (D.C. No. C–1220)

[Filed, September 24, 1973, Howard K. Phillips, Clerk, United States Court of Appeals, Tenth Circuit]

George Edelstein, Attorney, Department of Justice (*Thomas E. Kauper,* Assistant Attorney General, *Howard E. Shapiro,* Attorney, Department of Justice, of Counsel, *Joseph J. Gercke* and *James E. Corkey,* Attorneys, Federal Trade Commission, with him on the Brief), for Appellant.

John H. Schafer, of Covington & Burling, Washington, D.C. (*Robert F. Welborn,* of Welborn, Dufford, Cook, Phipps & Brown, Denver, Colorado, and *Gerald P. Norton,* Washington, D.C., of Counsel, with him on the Brief), for Appellee.

Before SETH, Circuit Judge, LARAMORE, Senior Judge, United States Court of Claims,* and DOYLE, Circuit Judge

SETH, Circuit Judge.

This is an appeal from the judgment of the District Court for the District of Colorado in a suit

*Sitting by Designation.

brought by the United States under the Clayton Act [15 U.S.C. § 21 (*1*)], and the Federal Trade Commission Act [15 U.S.C. § 45(*1*)] against ITT Continental Baking Company. The Government sued to recover civil penalties and for injunctive relief for three asserted violations of a Federal Trade Commission consent cease and desist order relating to the acquisition of bakeries.

The case was tried on a stipulation of facts. The court ruled that two of the three challenged acquisitions were prohibited by the FTC's order, and the third was not. The court ruled also that each prohibited acquisition was a single violation of the order and did not commence a continuing violation. The maximum single penalty of $5,000.00 for each of the two violations was imposed. The court further held that the FTC's order, which had initially been applied to Continental Baking Company was also applicable to ITT Continental Baking Company and that ITT Continental was liable for the penalties. The court did not order ITT Continental to divest itself of the assets acquired in violation of the order, but did order ITT Continental to comply with the terms of the FTC order until that order expired.

The Government appeals from the court's judgment insofar as it held that the third transaction was not an "acquisition" in violation of the FTC order, that each violation was not a continuing one subject to penalties for daily violation, and insofar as the court did not order ITT Continental to divest itself of the three acquisitions. ITT Continental cross-appeals from the judgment, in its entirety, of the district court.

In May 1960, the FTC issued a complaint against Continental Baking Company, charging that Continental's acquisition of several baking companies engaged in the production and sale of bread from 1952

through 1958 violated section 7 of the Clayton Act [15 U.S.C. § 18], and section 5 of the Federal Trade Commission Act [15 U.S.C. § 45]. While the administrative proceedings were still in the hearing stage on this complaint, the parties negotiated a consent cease and desist order. The relevant part of the order provided:

> "It is further ordered that for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order, permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission."

This consent order is the basis for this action, and must be construed as to the nature of several transactions asserted by the Government to be in violation of its provisions, and as to the imposition of penalties if a violation has taken place. This should be done in accordance with the standards laid down in *United States* v. *Armour & Co.*, 402 U.S. 673, and in *Hughes* v. *United States*, 342 U.S. 353. In the *Armour* case the Court said, after mentioning the negotiation and reasons for a consent decree:

> "For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. * * * the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation."

The consent order here concerned originated in a situation similar to a consent decree, and the reasons exist for application of the method of construction used in *Armour*. The order here is somewhat different in that it expressly permits or suggests reference to the complaint as an aid in construction. The result reached by the trial court in construing the order is not too restrictive nor unreasonable. It is one which may be arrived at by reference to the complaint, and by use of the method indicated in the *Armour* case. We will follow such a construction under these circumstances.

To consider the consent order "within its four corners," the wording is directed to the acqusition of businesses engaged in bread making, directly or indirectly. The only reference in the order is to the "acquiring" of such businesses. The complaint refers to the acquisition of bakeries as a course of conduct by Continental Bakeries. The order prohibits acquisition for a ten-year period. It is apparent from the record that it is upon the event of acquisition by the defendant that the local bakery is out of the bread making business. The acquisition itself, and not the *method* of operation thereafter, is the critical factor, and this is the event or incident to which the complaint and the order were directed.

This consideration of the order leads us to agree with the trial court as to whether the violations found were continuing or not, and also to agree as to the two particular acquisitions found by the trial court to be violations of the order.

As to the violations the record shows that in 1965 Continental and Bon Ton, Inc., of Missoula, Montana, entered into a sales agreement. Bon Ton, Inc. was engaged in the production of bakery products, including bread. These were sold at wholesale over thirteen routes in western Montana. Under the agreement, Bon

Ton became an exclusive distributor of bread produced by Continental. Also, in the language of the parties' stipulation of fact, the "* * * understanding was that Bon Ton would cease production of bread * * * before it became a distributor of Continental's bread." On July 10, 1965, Bon Ton stopped producing bread and on the following Monday, began to distribute bread produced by Continental over the same routes and to the same customers as theretofore. On July 12, 1965, Bon Ton's president and owner of the vast majority of its stock deposited in the Bon Ton bakery account a Continental check drawn in his favor in the amount of $37,500.00. ITT Continental has described this amount as a "loan" to enable Bon Ton to meet Continental's credit requirements. However, Bon Ton gave to Continental an option to purchase the distributorship for the same amount. Continental acquired Bon Ton's accounts receivable, route books, customer lists, trademarks, trucks, and all but approximately $1,800.00 of its bank account. At this time, Bon Ton's "president" and its drivers became employees, on a salaried basis, of Continental. In consideration of the transfer Continental cancelled all outstanding invoices for products sold to Bon Ton and also cancelled the $37,500.00 "loan."

In April 1966 Continental and the Wyoming Baking Company entered into a "sales agreement," which was, in all relevant aspects, the same as the agreement entered into between Continental and Bon Ton. The same "understanding" existed as to Wyoming Baking's discontinuance of its own production of bread. In accordance with this "understanding," Wyoming Baking had ceased its own production of bread and began distributing Continental's products over the same routes and to the same customers. The sales agreement also provided that Continental would have

an option to purchase the distributorship under certain circumstances. Some disagreement arose and the distributorship was sold, through the assistance of Continental, to another distributor from Idaho. This new ownership lasted about a year, at which time Continental itself acquired the ownership for a cancellation of its debts and $15,000.00.

What is herein considered the third incident concerned the Sheppard Baking Company. This arrangement was *not* considered by the trial court to be a violation of the order while the above two were held to be in violation.

In August 1966 Continental and Sheppard Baking Company, of Durango, Colorado, entered into a "sales agreement" which was, in all relevant aspects, virtually identical to the agreements entered into between Continental, and Bon Ton and Wyoming Baking. Prior to this time Sheppard Baking had been engaged in the production and sale of bakery products, including bread and bread-type rolls, which were sold over routes in southwestern Colorado. As with Bon Ton and Wyoming Baking, the "understanding" between Continental and Sheppard Baking was that Sheppard would cease production of bread upon becoming a Continental distributor. In mid-October 1966, Sheppard stopped producing its own bread and began distributing that of Continental over the same routes, to the same customers, and in substantially the same quantities as it had formerly sold and distributed similar products produced at its own plant prior to that date. However, unlike the transactions concerning Bon Ton and Wyoming Baking, the sales agreement between Continental and Sheppard Baking did not involve any "loan," nor option agreement, nor an outright payment. The following specific covenant appears in the "sales agreement" between Continental and Sheppard Baking:

Dealer covenants and agrees as follows:

* * * * *

> "To keep and maintain route books containing the name, address, and weekly purchases of each account in Dealer's territory. These route books shall be deemed an asset of the dealership and shall be transferred with the dealership in accordance with the provisions of this agreement."

The same provision, in exactly the same language, also appears in the sales agreements that Continental entered into with Bon Ton and Wyoming Baking, respectively.

Under these circumstances, we must hold that all three agreements accomplished the same purpose, which was to acquire indirectly such an interest or control in the business or the assets of the local baker so as to have him cease production. As to Sheppard Baking Company, there was no cash paid, and the dealership as such was not purchased, but the consideration for the exclusive arrangement was sufficient, and was effective to induce the owner to close the local bakery. This was an indirect acquisition prohibited by the order and a "payment" of money was not necessary to constitute a violation. The market and the volume was so acquired, and this was a principal asset of the bakery. There was a violation of the order in the arrangement with Sheppard Baking Company. See *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960).

The trial court found that ITT Continental Baking Company "* * * is a successor of Continental Baking Company and that it assumed the liabilities of Continental Baking Company including the liabilities under the Federal Trade Commission consent order." ITT Continental concedes that it is liable for any violations of the FTC order that Continental incurred *prior* to

the date of the merger between ITT and Continental, and the violations here concerned were such. *Regal Knitwear Co.* v. *NLRB,* 324 U.S. 9, is sufficient authority for this position under the facts before us.

As to the issue of a continuing violation for penalty purposes, the trial court found that the terms of the consent order "proscribe only the act of acquisition and that the violations of the consent order found as to Bon Ton and Wyoming Baking did not constitute a 'continuing failure or neglect to obey' said order. Accordingly the government's demand for imposition of daily penalties under 15 U.S.C. §§ 21(*1*) and 45(*1*) is denied. Once these two acquisitions were accomplished, the violations were complete."

Counsel for both parties have cited no cases directly in point, nor has our own independent research disclosed any such cases, dealing with what constitutes a "continuing failure or neglect to obey" a consent order of the type here in question for the purposes of imposing daily penalties for violation. 15 U.S.C. §§ 21 (*1*), 45(*1*).

ITT Continental argues that the FTC order in this case does not proscribe the "holding of assets," but merely the acquisition thereof, and therefore there can be no continuing failure to obey the order by virtue of ITT Continental's holding of the dealership assets once they were initially acquired.

The Government, on the other hand, asserts that because a ban on acquisitions has been construed as a ban on the relationship such acquisitions create, see *United States* v. *du Pont & Co.,* 353 U.S. 586 (1957), *Gottesman* v. *General Motors Corp.,* 414 F. 2d 956 (2d Cir.), the parties in this case intended to prohibit, by the consent order, the relationship created by such acquisitions in the same or similar manner that section 7 of the Clayton Act, 15 U.S.C. § 18,

prohibits such relationship or effects. See *United States* v. *du Pont & Co.,* 353 U.S. 586 (1957).

As we have recognized above, the scope of a consent decree must be discerned within its "four corners," *United States* v. *Armour & Co.,* 402 U.S. 673, and must be construed "as it is written."

The "consequences" argument is significant as to penalties to be assessed for violation of the order; that is, whether the order was directed to the acquisition or to the acquisition and retention of assets or interests. We have indicated above that we agree with the determination of this issue by the trial court. This was an interpretation of the consent order, and the result is in accordance with the prevailing standards. This court has determined that the three acquisitions were in violation of the order. The imposition of the penalties does not insulate the consequences of the acquisition from further proceedings which remain available to the Government. The defendant has taken the position that the order did not extend to the holding of assets acquired contrary to the order, or to the consequences thereof. The trial court so held and we have affirmed on this point. Thus the consequences of holding have been held to be outside the order, and outside the penalties, and outside of this action.

Divestiture as a remedy was advocated and advanced by the Government, but the trial court did not include it in its order. The extent of the penalties is within the discretion of the trial court. The trial court had jurisdiction to order divestiture or equitable remedies generally.

The case is remanded only for the imposition of a penalty by the trial court for the violation of the order in the Sheppard Baking Company acquisition as a single violation, in whatever amount the court

sees fit within the statutory limits. Otherwise, the case is affirmed.

Doyle, Circuit Judge, concurring.

While I concur in the court's opinion, it is with reluctance that I approve of the remedy which has been imposed. Considering the frequency and magnitude of defendant-appellant's transgressions in this case, the mere imposition of a fine falls far short of a satisfactory outcome. Ordinarily a divestiture of the wrongfully acquired businesses would be the proper remedy, both to fulfill the objective of the antitrust laws, and to deter the defendant-appellant and other similarly-situated entities from committing such abuses in the future. *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573 (1972); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *E. I. Du Pont De Nemours & Co.*, 366 U.S. 316, 328–35 (1961); *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 128 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189 (1944); *United States* v. *Beatrice Foods Co.*, 351 F. Supp. 969 (D. Minn. 1972). However, I have concluded that because of deficiences in the consent decree and other factual characteristics of this case, the result reached, while weak, is within the range of remedies the trial court may impose. On this basis I agree with the result.

APPENDIX B

September Term—September 24, 1973

Nos. 72-1072 and 72-1073 (Cross-Appeal)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT
v.
ITT CONTINENTAL BAKING COMPANY, DEFENDANT-APPELLEE

Before Hon. OLIVER SETH, Circuit Judge, Hon. DON N. LARAMORE, Senior Judge, Court of Claims, and Hon. WILLIAM E. DOYLE, Circuit Judge

These causes came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

On consideration whereof, it is ordered that the cases are remanded only for the imposition of a penalty by the United States District Court for the violation of the order in the Sheppard Baking Company acquisition as a single violation, in whatever amount the United States District Court sees fit within the statutory limits. Otherwise, the cases are affirmed. Doyle, Circuit Judge, concurring.

A true copy.

Test.

HOWARD K. PHILLIPS,
Clerk.

By LAVON M. IRLBECK,
Deputy Clerk.

APPENDIX C

In the United States District Court for the District of Colorado

Civil Action No. C–1220

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ITT CONTINENTAL BAKING COMPANY, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case involves a complaint filed by the United States against ITT Continental Baking Company, for alleged violations of a final consent order of the Federal Trade Commission. The plaintiff seeks civil penalties and equitable relief.

The case has been submitted by the parties for decision by the Court upon the basis of a stipulation of facts incorporating various exhibits attached thereto and a supplemental stipulation. These stipulations the Court incorporates by reference as part of its findings. Excellent briefs and oral arguments were presented, and based upon these stipulations, briefs and arguments, the Court makes the following additional findings of fact and conclusions of law:

1. The most important issues presented are (1) whether certain arrangements and transactions between Continental Baking Company ("Continental") and three separate companies violated the terms of Section III of the consent order of the Federal Trade Commission in FTC Docket No. 7880, which order issued on May 15, 1962, and became final on July 14, 1962; and (2) whether such arrangements and trans-

actions constitute continuing violations in the sense that a separate penalty should be assessed for each day after each violation occurred.

The commission order provides in material part:

> That for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent [Continental Baking Company] shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order, permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission.

Other issues presented are (a) successorship as involving ITT Continental Baking Co., (b) the obligation of the Federal Trade Commission to provide notice of violation of its order to defendant, and (c) the Court's authority to grant injunctive and other equitable relief in a civil penalty proceeding brought by the United States on behalf of the Federal Trade Commission.

2. The jurisdiction of the Court is admitted and is found. *See,* 15 U.S.C. § 49; 29 U.S.C. §§ 1337, 1345, 1355, 1395.

3. The basic issues depend not upon questions of statutory construction, but upon an interpretation, in the light of the facts, of the consent order, which, as a negotiated order, is almost in the nature of a contract. In an action to enforce a penalty such a consent order should be strictly construed according to its terms, and, all ambiguities or uncertainties should be resolved against the imposition of a penalty.

4. I find that, particularly in businesses where route salesmen are involved, customer lists have a peculiar value, and that they frequently represent the principal asset of a business. I find that here, with reference to Bon Ton, [Count I] there was an acquisition, directly or indirectly, of assets. The way the contract was structured from its outset, although it was not carried through exactly in accordance with its original structuring, there was an intent to acquire assets, and these assets, the most important of which were sales routes and sales volume, were acquired.

5. Without going into detail, I make a similar finding as to the acquisition of Wyoming Baking Co., at Casper, Wyoming [Count II]. I find that with reference to Wyoming Baking there was, in fact, an acquisition of certain of the assets, more particularly the sales routes and sales volume, and I find that there was an intent to acquire those assets. I further find that although the meaning of the consent order was to prohibit these acquisitions, competent counsel could reasonably read it as not prohibiting Continental's agreements with Bon Ton and Wyoming Baking. This finding is made in connection with the exercise of the Court's discretion in fixing the amount of the penalty to be assessed.

6. With respect to Count III, relating to Sheppard Baking Co. at Durango, Colorado, I find that there was no acquisition, directly or indirectly of any assets. While both parties have asserted that all these transactions are basically the same and have no legally distinguishing features, I disagree. I find that the Sheppard-Durango situation differs from the other two in that there was no consideration whatsoever paid to Mr. Sheppard. Sheppard-Durango was a failing business, and the defendant did not, in the Sheppard-Durango situation, acquire the route lists or the customer lists or acquire access to such lists as it did in

the instances of Bon Ton and Wyoming Baking. Therefore, I find that the Sheppard-Durango transaction differs from the Bon Ton and Wyoming Baking transactions and that it does not violate the consent order.

7. The Court further finds that the terms of the consent order proscribe only the act of acquisition and that the violations of the consent order found as to Bon Ton and Wyoming Baking did not constitute a "continuing failure or neglect to obey" said order. Accordingly the government's demand for imposition of daily penalties under 15 U.S.C. §§ 21(*1*) and 45(*1*) is denied. Once these two acquisitions were accomplished, the violations were complete.

8. I find that there was no obligation whatsoever on the Federal Trade Commission to give notice of its intent to certify a civil penalty case to the Attorney General. Had the Court concluded that the violations were continuing in nature, a determination of the question of whether or not reasonable notice should been given would be required. In light of the Court's finding in paragraph 7 hereof, this question need not be resolved, but, as obiter dictum, it would seem unreasonable to permit the commission to knowingly let daily penalties accrue without giving notice of the commission's position at the earliest reasonable time.

9. The Court finds that it is empowered to grant injunctive relief in a civil penalty proceeding brought by the Attorney General with respect to a Federal Trade Commission order. The Court's attention has been directed to *Herbold Lab., Inc.* v. *United States*, 413 F. 2d 343 (9th Cir. 1969), where the Court of Appeals found no such authority to exist. However, this Court respectfully declines to follow this authority, believing that Congress, in the statutory scheme underlying this action, did not intend to

deprive the district courts of their general equity powers. I find authority to issue an injunction and hereby conclude that an injunction should issue in the exact words of the Commission's order commanding defendant's future compliance therewith. The Court declines to grant the plaintiff's request for broader equitable relief.

10. The Commission's original proceeding and consent order involved Continental Baking Company, which ceased to exist on September 13, 1968, by virtue of its merger into ITT Continental Baking Company ("ITT Continental"), the defendant herein. I find that ITT Continental Baking Company is a successor of Continental Baking Company and that it assumed the liabilities of Continental Baking Company including the liabilities under the Federal Trade Commission consent order. No issue was raised by defendant as to its liability for monetary penalties for any violation by Continental.

11. In view of the foregoing the Court finds that penalties of $5,000, should be imposed upon defendant on both Count I and II, for a total of Ten Thousand Dollars ($10,000). and that an injunction should enter against defendant in the terms of the Commission's consent order against Continental, said injunction to expire on May 15, 1972.

Dated at Denver, Colorado, this 2d day of August, 1971.

Fred M. Winner,
United States District Judge.

APPENDIX D

In the United States District Court for the District of Colorado

Civil No. C-1220

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ITT CONTINENTAL BAKING COMPANY, DEFENDANT

FINAL JUDGMENT AND ORDER

Upon the Court's Findings of Fact and Conclusions of Law entered in this case.

It is Adjudged and Decreed That:

1. Judgment is entered for plaintiff in the amount of $5,000 as to both Counts I and II of the Amended Complaint for a total of $10,000.

2. Judgment is entered for defendant on Count III of the Amended Complaint.

3. From the date of entry of this Final Judgment and Order until May 15, 1972, defendant is ordered to cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or noncorporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls, unless the Federal Trade Commission, on petition for modification of Section III of its order issued against Continental Baking Company (FTC Docket No. 7880), permits such an acquisition by defendant, said modification to be within the sole and final discretion of the Federal Trade Commission.

FRED M. WINNER,
U.S. District Judge.

Dated: AUGUST 2, 1971.

APPENDIX E

Commission Orders Containing Non-Acquisition Provisions As Of February 1, 1974*

Respondent Docket No.	Industry involved	Year of expiration	Litigated/ consent
1. ABC Consolidated Corp., Docket No. 7652.	Motion picture theatre concessions.	1974	Consent.
2. American Brake Shoe Co., Docket No. 8622.	Sintered metal friction material.	1980	Litigated.
3. Allied Chemical Corp., Docket No. 8767.	Automotive yarn, webbing or belts.	1981	Litigated.
4. Allied Stores Corp., Docket No. C-1001.	Department or GMAF stores.	1975	Consent.
5. Amerada Hess Corp., Docket No. C-2456.	Asphalt refining; crude oil refining.	1983; perpetual	Consent.
6. American Bakeries, Docket No. C-1111.	Bakery companies.	1976	Consent.
7. American Cyanamid Co., Docket No. C-2381.	Toilet preparations.	1983	Consent.
8. ARA Services, Inc., Docket No. C-2360.	Periodical and paperback book wholesalers.	1983	Consent.
9. ARA Services, Inc., Docket No. C-2400.	Vending machine operations.	1983	Consent.
10. Beatrice Foods Co., Docket No. 6653.	Dairy companies.	1977	Consent.
11. H. C. Bohack, Docket No. C-1411.	Grocery stores.	1978	Consent.
12. Bordon Company, Docket No. 6652.	Dairy companies.	1974	Consent.

*Some orders were entered against more than one respondent, and some orders contain more than one non-acquisition provision.

Respondent Docket No.	Industry involved	Year of expiration	Litigated/ consent
13. Broadway-Hale Stores, Inc., Docket No. C-1057.	Department or GMAF stores.	1974	Consent.
14. Burlington Industries, Inc., Docket No. C-1473.	Textile mill products.	1979	Consent.
15. Campbell Taggart Associated Bakeries, Inc., Docket No. 7938.	Bakery companies.	1977	Consent.
16. Chemetron Corp., Docket No. C-1567.	Arc welding business.	1979	Consent.
17. Cole National Corp., Docket No. 8701.	Key manufacturing.	1977	Consent.
18. Consolidated Foods Corp., Docket No. C-1024.	Grocery stores; Dairy product stores.	Perpetual	Consent.
19. Continental Oil Company, Docket No. C-1270.	Vinyl chloride monomer.	1977	Consent.
20. Dean Foods Company, Docket No. 8674.	Dairy companies.	1977	Consent.
21. Ekco Products Co., Docket No. 8122.	Commercial meat handling equipment.	1985	Litigated.
22. Endicott-Johnson Corp., Docket No. C-1009.	Shoes; footwear.	1985	Consent.
23. EZ Painter Corporation, Docket No. C-2106.	Manually powered paint applicators.	1982	Consent.
24. Foremost Dairies, Docket No. 6495.	Dairy companies.	1975	Consent.
25. Foremost Dairies, Inc., Docket No. C-1161.	Pharmaceutical preparations; drugs; druggists' sundries.	Perpetual	Consent.
26. Frito-Lay, Inc., PepsiCo Inc., Docket No. 8606.	Carbonated soft drinks; Snack food products.	1978	Consent.
27. Fruehauf Corp., Docket No. 6608.	Truck trailers.	1976	Consent.
28. The Gates Rubber Co., Docket No. C-2137.	Rubber belts and belting; Rubber hose and hosing.	1983	Consent.

Respondent Docket No.	Industry involved	Year of expiration	Litigated/consent
29. General Mills, Inc., Docket No. C-1501.	Snack food products.	1979	Consent.
30. Georgia-Pacific Corp., Docket No. 8843.	Timberland; softwood.	1977; 1982	Consent.
31. Georgia-Pacific Corp., Docket No. C-751.	Coarse paper products or converters.	1974	Consent.
32. Golden Grain Macaroni Co., Docket No. 8737.	Dry paste products.	1983	Litigated.
33. W. R. Grace, Docket No. C-1182.	Chocolate and cocoa products.	1977	Consent.
34. Grand Union Company, Docket No. C-1350.	Grocery stores.	1978	Consent.
35. Hercules-Columbian Rope, Docket No. C-1794.	Rope.	Perpetual	Consent.
36. Illinois Central Industries Inc., Midas-International Corp., Docket No. C-2370.	Automotive brake shoes; disc brake pads, brake parts or flashers.	1978; 1983	Consent.
37. Imperial Chemical Industries, Ltd., Docket No. C-2175.	Commercial explosives.	1982	Consent.
38. Koppers Company, Inc., Docket No. 8755.	Resorcinol.	1981	Consent.
39. Korvette-Spartans, Docket No. C-1106.	Department or GMAF stores.	1976	Consent.
40. Kroger/Federated, Docket No. C-2067.	Retail food stores.	1981	Consent.
41. L. G. Balfour Co., et al., Docket No. 843.	Fraternity products.	1981	Litigated.
42. Lehigh Portland Cement Co., Docket No. 8680.	Ready-mixed concrete; concrete products.	1982	Consent.

Respondent Docket No.	Industry involved	Year of expiration	Litigated/consent
43. Maremont Corporation, Docket No. 8763.	Automotive replacement parts, accessories, and equipment.	1981	Consent.
44. Marquette Cement Mfg. Co., Docket No. 8685.	Ready-mixed concrete; concrete products.	1979	Litigated.
45. May Department Stores, Docket No. C-1105.	Department or GMAF stores.	1976	Consent.
46. Mead Corporation, Docket No. C-880.	Containerboard; corrugated products.	1975	Consent.
47. Mississippi River Fuel, Docket No. 8657.	Ready-mixed concrete; concrete products.	1982	Litigated.
48. Missouri Portland Cement Company, Docket No. 8783.	Ready-mixed concrete; concrete products.	1983	Consent.
49. National Tea Company, Docket No. 7453.	Grocery stores.	1976	Litigated.
50. Occidental/Hooker, Docket No. C-1749.	Metal finishing products.	1980	Consent.
51. OKC Corp., Docket No. 8802.	Ready-mixed concrete; concrete products.	1982	Litigated
52. The Papercraft Corporation, Docket No. 8779.	Gift wrap products.	1983	Litigated.
53. Phillips Petroleum Co. et al., Docket No. C-1088.	Polypropylene; Low density polyethylene.	1976; 1986	Consent.
54. Procter & Gamble Company, Docket No. C-1169.	Household consumer products; coffee.	1974; 1977	Consent.
55. Rexall Drug and Chemical Company, Docket No. C-1252.	Glass and plastic containers.	1977	Consent.
56. St. Regis Paper Co., Docket No. C-917.	Linerboard, corrugating medium.	1975	Consent.
57. Scott Paper Co., Docket No. 6559.	Sanitary paper products.	Perpetual	Consent.

Respondent Docket No.	Industry involved	Year of expiration	Litigated/ consent
58. Seeburg Docket No. 8682.	Vending machines.	1980	Litigated.
59. Standard-Amoco, Docket No. C-1371.	Polypropylene; Polypropylene film.	1978	Consent.
60. The Stanley Works, Docket No. 8760.	Cabinet hardware products.	1983	Litigated.
61. Swingline, Inc., Docket No. 8759.	Industrial pneumatic nailers and staplers.	1979	Consent.
62. Textron, Inc., Docket No. C-1740.	Bearings.	1981	Consent.
63. Union Bag-Camp Paper, Docket No 7946.	Coarse paper; container-board; special food board.	1975	Consent.
64. United Industrial Syndicate, Inc., Docket No. C-1860.	Automotive fuel pumps.	1982	Consent.
65. Vulcan Materials, Docket No. C-1409.	Construction aggregates; ready-mixed concerete.	1978	Consent.
66. Winn-Dixie Stores, Inc., Docket No. C-1110.	Retail food stores.	1978	Consent.

U.S. GOVERNMENT PRINTING OFFICE: 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1290

UNITED STATES OF AMERICA, PETITIONER

v.

ITT CONTINENTAL BAKING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In our petition for a writ of certiorari we referred (Pet. 9, n. 7) to *United States* v. *Beatrice Foods Co.*, 351 F. Supp. 969 (D. Minn.). Among other rulings, that case held, contrary to the Tenth Circuit's decision herein, that an acquisition prohibited by a Federal Trade Commission consent order is a continuing violation which subjects the acquiring firm to the imposition of daily penalties under the civil penalty provisions of the Clayton and Federal Trade Commission Acts (15 U.S.C. 21(*l*), 45(*l*)). On March 8, 1974, the Eighth Circuit affirmed the district court's judgment. *United States* v. *Beatrice Foods Co.*, C.A. 8, No. 73-1120 (App., *infra*). In its opinion the Eighth Circuit refers to and expressly rejects the Tenth Circuit's

534-987—74——1

ruling in the present case that a prohibited acquisition is a single rather than a continuing violation of the order (App., *infra*, pp. 21–25). There is, therefore, now a direct conflict between the Eighth and Tenth Circuits on the question presented in the petition.

The petition for a writ of certiorari should be granted to resolve the conflict between the circuits.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

APPENDIX

United States Court of Appeals for the Eight Circuit

No. 73–1120

Appeal from the United States District Court for the District of Minnesota

UNITED STATES OF AMERICA, APPELLEE

v.

BEATRICE FOODS CO., APPELLANT

Submitted: October 15, 1973
Filed: March 8, 1974

Before LAY and BRIGHT, *Circuit Judges,* and EISELE, *District Judge.**

LAY, *Circuit Judge.*

This is an appeal from a summary judgment granted by the District Court for the District of Minnesota, the Honorable Philip Neville presiding, in a suit brought by the United States against Beatrice Foods Company under § 11(*l*) of the Clayton Act, 15 U.S.C. § 21(l); and § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*). The government sought civil penalties and injunctive relief for two violations of a Federal Trade Commission consent order. The trial court granted summary judgment in favor of the United States, assessed monetary penal-

*G. THOMAS EISELE, United States District Judge, Eastern District of Arkansas, sitting by designation.

ties and ordered divestiture of Beatrice's holdings acquired in violation of the FTC order.[1]

On appeal Beatrice contends that:

(a) Under Count I, there has been no showing that Beatrice's transactions with Maple Island Dairies violated the consent decree;

(b) The district court erred in granting summary judgment in that questions of fact exist as to the intended meaning of the consent decree;

(c) The district court erred in imposing daily penalties for the Maple Island transactions, first, because Beatrice was not given adequate notice of the alleged order violation, and second, because there was no continuing violation but only a single illegal acquisition;

(d) The district court lacked the power to grant injunctive relief requiring Beatrice to divest itself of its interest in Maple Island; and

(e) Under Count II, the court erred in requiring Beatrice to divest its minority stock interest in Valley Gold Dairies.

Background

In 1956, the Federal Trade Commission instituted proceedings against Beatrice and three of its competitors alleging acquisitions in violation of § 7 of the Clayton Act, 15 U.S.C. § 18, and § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). The proceedings against Beatrice's competitors were all settled by consent decrees.[2] In March, 1964, an FTC

---

[1] The opinions below are reported at 344 F. Supp. 104 (summary judgment); and 351 F. Supp. 969 (penalties and decree).

[2] Each firm was ordered to: [C]ease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the course of business) of any concern, engaged * * * in the business of manufacturing, processing or selling at wholesale or on retail milk routes [specified dairy products].

hearing examiner held that five of Beatrice's recent acquisitions violated §7 of the Clayton Act. The examiner ordered divestiture of the five firms and enjoined Beatrice for ten years from acquiring "the whole or any part of the stock, share capital or assets" of any dairy farm. On April 26, 1965, the FTC affirmed the examiner's decision.

Beatrice petitioned for review of the order in the Ninth Circuit. While the petition was pending, the FTC and Beatrice agreed to settle the case with entry of a modified order. In May, 1967, the Ninth Circuit modified the FTC order to reflect the settlement and affirmed the order as modified. On June 7, 1967, the FTC issued the modified order.

The modified order required divestiture of five unlawfully acquired dairies, whether owned in whole or in part by Beatrice, to a single purchaser.[3] The order also contained the following cease and desist provision:

> Beatrice shall cease and desist, for a period of ten (10) years from the effective date of this order from acquiring, directly, or indirectly, any interest in any firm, corporate or non-corporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any State of the United States or in the District of Columbia in the business of manufacturing, processing or distributing at wholesale or on retail milk routes any of the products described in Paragraph I of this order, without the prior approval of the Commission.

---

[3] The modified order permitted one dairy in West Virginia to be sold separately. The original order had required divestiture of five dairy plants scattered all over the country. The consent decree, however, substituted five plants all located in the southwest.

COUNT I: THE MAPLE ISLAND TRANSACTIONS

Count I of the government's complaint alleged that Beatrice violated the above cease and desist order by acquiring an "interest in" Maple Island Dairies. The district court so found.

Maple Island Dairies distributed dairy products in Minnesota and Wisconsin. In 1968, Maple Island decided to dispose of its unprofitable "northern division" distribution system. This division had been distributing dairy products bearing the Maple Island label (1) at four stores owned by Maple Island,[4] (2) along 11 routes operated by Maple Island employees, and (3) along 11 routes owned and operated by independent distributors.

Representatives from Maple Island met frequently with representatives of Russell Creamery of Wisconsin, Inc., a wholly-owned subsidiary of Beatrice. As a result of these discussions, the 11 routes owned by Maple Island were converted into independent distributorships. The new distributors purchased from Maple Island the assets used to operate the routes, including inventory and accounts receivable. The purchase of seven of the 11 routes was financed primarily by Beatrice. The new distributors agreed to distribute Maple Island products exclusively. They also executed conditional sales contracts, factor's liens, and notes in favor of Maple Island. Then, Beatrice, Maple Island, and each distributor signed an agreement whereby Maple Island assigned to Beatrice the conditional sales contract, factor's lien, note and franchise agreement, and the distributor accepted the assignment. On September 1, 1968, Russell Creamery (Beatrice) began supplying the dairy products for all but a few of the new distributors.

[4] The disposition of the four Maple Island stores is not involved in this case.

The 11 independent Maple Island distributors, who owned their own physical facilities, only owed Maple Island for their 30-day trade accounts. Four paid these amounts themselves, six were financed by Beatrice and one was dropped from the arrangement. Maple Island also granted to Beatrice the right to use Maple Island's labels in the northern division for five years.

As a result of the above transactions, the government charged that Beatrice had violated the consent cease and desist order by acquiring an "interest in" Maple Island.

On appeal, Beatrice argues that the phrase used in the FTC order, "interest in," "does not apply to assets or interests *of* a dairy, but rather prohibits the acquisition of an interest *in* a dairy." In rejecting this argument, and in holding that there was no dispute of facts, Judge Neville found that the term "interest" has a consistent and commonly understood meaning in relationship to property, business and other things of value, citing the Restatement of Property § 5:

> The word "interest" is used in this Restatement both generically to include varying aggregates of rights, privileges, powers, and immunities, and distributively to mean any one of them.

The district court then found that:

> "[I]nterest" includes, by definition, the rights transferred here to Beatrice by Maple Island. The license to use the label, the notes, distributorship agreements, sales contracts and factor's liens are all "rights in the nature of property" and valuable rights forming a part of the business and in many instances comprising assets of Maple Island. Whereas before, Maple Island held all rights, privileges, powers, and immunities relating to the assets transferred, after the transfer, Beatrice held some of those rights

> and the independent distributors held the rest. And while the sales contracts, factor's liens and notes did not give Beatrice title, Beatrice clearly held a security *interest,* i.e., a right of ownership contingent upon the default of the titleholder. Such interests are no less interests within the terms of the order because contingent upon default of the debtor. Perhaps most significant, prior to the transfer, Maple Island had the "rights to the benefits" inseparable from the property transferred, *i.e.,* the sales of its milk to the customers along Maple Island's former routes. After the transfer, Beatrice had those rights at least for the minimum period of the distributorship agreements and the advantage of an established and continuing relationship with the distributors. Beatrice thereby gained access to all or most of the customers—the sales volume—who previously brought milk from Maple Island. The net result was an increase in gross sales of Russell Creamery in Superior alone of nearly $1 million, about 30%. *United States* v. *Beatrice Foods Co.,* 344 F. Supp. 104, 111–112 (D. Minn. 1972).

Beatrice's argument is that the trial court was totally preoccupied with defining "interest" and failed to recognize that the real term of art within the decree is the preposition "in" as distinguished from the possible use of the word "of." Thus it is argued that the compromise decree allows the purchase of interests *of* a dairy and proscribes only the acquisition of interests *in* a dairy. We think the argument disingenuous. Neither preposition in the context of the overall decree demonstrates a definitive, special meaning. Both "in" and "of" are, in common usage, words of function bearing similar connotations of active and possessive participation. *See* Webster's Third

New International Dictionary 1139, 1565 (1967). We must give the decree its "normal meaning" rather than one party's view of its purpose.

It is urged the trial court erred in failing to admit evidence of the pre-order negotiations between the parties to ascertain "the purpose" of the decree. Similarly, it is argued that post-decree conduct is also material.[5] We reject this contention on the same grounds that the trial court did. In *United States v. Armour & Co.,* 402 U.S. 673, 682 (1971), the Supreme Court observed:

> [T]he scope of a consent decree must be discerned within its four corners, and *not by reference to what might satisfy the purposes of one of the parties to it.* (emphasis added).

[5] On January 25, 1968, the FTC informed National Dairy, one of Beatrice's competitors who had earlier signed a consent decree, that the acquisition of the market share of distributors or processors would violate National's order. Specifically, the FTC wrote that:

"National Dairy is hereby notified that the Commission regards the prohibition on acquisitions in said order, Part III, as including the entering into of any arrangement with another party by which National Dairy obtains the market share, in whole or in part, of such other party. Such arrangements would include any transaction by which a processor ceases selling milk under his own label and instead distributes National Dairy milk under one of National Dairy's labels. *On the other hand, ordinary requirements or supply contracts under which a processor-distributor discontinues his processing business but continues to operate as a distributor selling, under his own label, milk supplied him by National Dairy would not be regarded as coming within the order.*" (emphasis added).

The FTC advised Beatrice that it would interpret the Beatrice decree in the same manner, even though the language of the two orders was slightly different. Parenthetically, we note that the Commission's interpretation of the National Dairy

See also Gila Valley Irrigation Dist. v. *United States*, 118 F. 2d 507 (9th Cir. 1941); *United States* v. *J. B. Williams Co., Inc.*, 354 F. Supp. 521 (S.D.N.Y.), *appeal docketed*, No. 73–1624 (2d Cir. 1973); 80 Harv. L. Rev. 1303, 1315 (1967).

Although we think the order clear, parenthetically we note that it only prohibits acquisitions made without prior Commission approval. Beatrice knew that it was under a broad cease and desist order which was designed to prevent a large multimarket company from acquiring regional dairy firms. Beatrice could easily have allayed the risk of later litigation by seeking the Commission's prior approval before entering into negotiations with Maple Island. Significantly, Beatrice did seek FTC approval for several other acquisitions during this same period of time.

---

order was subsequently invalidated and no new clarification ensued.

Beatrice contends that the above-underlined sentence, expressed the Commission's intent not to prohibit the acquisition of distributorships. It argues that this post-decree conduct by the FTC is relevant to a determination of the order's meaning. However, its authority for this point, *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959), does not appear to extend as far as Beatrice would like. There, the Court found from the language of the decree *alone* that the government's position was at best a strained construction. It then bolstered this view by reference to the government's post-decree conduct, which had been consistent with the Court's reading of the decree. Thus, it appears that the decree in *Atlantic Refining* was *unambiguous* and that the post-decree conduct was somewhat superfluous.

Furthermore, as the government notes, the FTC's letter of January 25, 1968, sets forth far different factual hypothesis than Beatrice's arrangement whereby the rights under the distributorships carried with them the license to use Maple Island's label, its goodwill and sales volume in the northern division.

IMPOSITION OF DAILY PENALTIES

With regard to the Maple Island transaction, the district court fined Beatrice $200 per day from September 1, 1968 (the date Beatrice began supplying milk to the independent distributors) through October 23, 1970 (the date the government filed its complaint), for a total of $156,400.

Beatrice attacks the imposition of the above penalty on two grounds. First, it argues that it was not given adequate notice of the violation until October 23, 1970, the date the complaint was filed.[6] Second, Beatrice contends that daily penalties were unwarranted because the consent order prohibits only the *act of acquisition* and not continued holding of illegally acquired assets. These two contentions will be discussed separately.

A. Notice

Beatrice argues that *no* penalty could be imposed before the FTC gave notice that Beatrice's conduct was in violation of the cease and desist order. Assessment of penalties for conduct occurring before such notice would, according to Beatrice, violate due process.

We look first at the statutory scheme for the imposition of penalties to determine if a notice requirement was intended by Congress.

When the FTC determines that one of its orders has been violated, the statutory procedure calls for cer-

---

[6] Since the trial court held that this was the *last* day for which a penalty could be imposed, acceptance of Beatrice's notice theory would mean that only one day's penalty could be assessed.

tification of pertinent facts to the Attorney General. 15 U.S.C. § 56. If the Attorney General decides to bring suit, the penalty provisions of § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), and § 11(*l*) of the Clayton Act, 15 U.S.C. § 21(*l*), come into play.[7] These statutes contain no notice requirement. In *United States* v. *J. B. Williams Co., Inc.*, 354 F. Supp. 521 (S.D.N.Y.), *appeal docketed*, No. 73–1624 (2d Cir. 1973), the district court unequivocally rejected the argument that notice is statutorily required:

> The court disagrees with defendants' assertion that "it is settled that the Government may not impose penalties under 15 U.S.C. § 45(*l*)

[7] Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), provides:

"Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense."

Section 11(*l*) of the Clayton Act, 15 U.S.C. § 21(*l*), provides:

"Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense."

> with respect to alleged violations of orders where these violations preceded Commission notice that the conduct was deemed in violation of the order." Defendants' Memorandum 58–59. *Such notice is neither required by the statutory scheme nor by the Commission's rules and procedures.* The only procedural step required by the F.T.C. Act before institution of a Section 5(*l*) suit is the certification of facts relating to the alleged violation to the Attorney General. *See* Section 16, 15 U.S.C. § 56. *A blanket rule requiring prior notice by the Commission of alleged violations of its orders has absolutely no statutory basis whatever.*
>
> *Id.* at 532 (emphasis added).

The legislative history of the penalty provisions supports this conclusion. The Federal Trade Commission Act was amended in 1938 by the Wheeler-Lea Act, which provided that FTC orders would become final in 60 days or upon completion of review proceedings in the courts of appeals. Act of March 21, 1938, 52 Stat. 111. The Clayton Finality Act of 1959 similarly amended the Clayton Act. Act of July 23, 1959, 73 Stat. 243. These significant changes lend considerable support to the government's position that no notice is required by the statute. Prior to 1938, the Commission had to prove *three* violations before penalties could be assessed. First, it had to prove a violation upon which to base its own cease and desist order. Second, it had to prove a violation of the order (*i.e.*, conduct occurring *after* the issuance of the order) before a court of appeals could enforce the order. Finally, it had to prove a third violation for a violator to be held in contempt of the court of appeals enforcement order. The Wheeler-Lea Amendment changed this cumbersome procedure. However, the same three steps remained in effect insofar as Clayton Act violations were concerned until 1959. The legisla-

tive history of the Clayton Finality Act, discussed in *FTC v. Jantzen, Inc.*, 386 U.S. 228 (1967), makes it clear that that amendment was designed to streamline enforcement proceedings under the Clayton Act in the same manner as the Wheeler-Lea Amendment had done for the FTC Act:

> The effectiveness of the Clayton Act . . . has long been handicapped by the absence of adequate enforcement provisions. . . . S. 726 would put teeth into Clayton Act orders and would fill the enforcement void which has existed for many years.

S. Rep. No. 83, 86th Cong., 1st Sess. 2 (1959).

> The bill . . . is in effect a perfecting amendment to the Clayton Act. It has no other purpose than to effect the will of Congress with respect to the role of the Federal Trade Commission in Clayton Act enforcement in the same manner and to the same degree that the will of Congress was effectuated by the Wheeler-Lea amendments to the Federal Trade Commission Act.

105 Cong. Rec. 12732.

In *FTC v. Henry Broch & Co.*, 368 U.S. 360 (1962), the Supreme Court discussed this legislative history and then noted:

> In contrast, the procedures that are contained in the Federal Trade Commission Act for enforcement of cease-and-desist orders issued thereunder are much simpler and more direct. A cease-and-desist order issued pursuant to section 5 of the Federal Trade Commission Act, as amended, becomes final upon the expiration of the time allowed for filing a petition for review, if no such petition is filed within that time.

Id. at 366 n. 6, *quoting* H.R. Rep. No. 580, 86th Cong., 1st Sess. 4.

However, the Supreme Court did warn that overly broad language in an FTC order would not necessarily "withstand scrutiny under the 1959 amendments." The Court said:

> The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.
>
> *Broch, supra* at 367–368.

See also Sperry Rand Corp v. *FTC,* 288 F.2d 403, 404 (D.C. Cir. 1961); and *United States* v. *Standard Distributors, Inc.,* 267 F. Supp. 7, 9 (N.D. Ill. 1967), for a similar interpretation. *Cf. United States* v. *H. M. Prince Textiles, Inc.,* 262 F. Supp. 383, 388 (S.D. N.Y. 1966).

We are thus satisfied that no notice is required under the statutes. However, this does not resolve the constitutional challenge to the imposition of penalties before notice of violation is given. As indicated Beatrice asserts that notice was not given until the complaint was filed. On the other hand, the government's position is that the cease and desist order itself gives sufficient notice of what conduct is proscribed.

Beatrice relies primarily on *Continental Baking Co.* v. *Dixon,* 283 F. Supp. 285 (D. Del. 1968). There, the government notified Continental that its compliance report, with regard to a cease and desist order previously entered against it, was unacceptable in that the information it contained was inadequate and incomplete. Thereafter, Continental filed a supplemental report. The FTC then notified Continental that the reports did not show compliance and added that it was unable to determine whether Continental was in violation of the order without more information.

Continental then brought suit, seeking to quash the FTC's order for a third report and requesting a preliminary stay suspending penalties until the dispute over the reports was settled. Under Continental's interpretation of the statute, 15 U.S.C. § 45(*l*), it would be subjected to penalties for each day that the controversy remained unresolved (if it were ultimately found in violation)—hence, the request for the stay.

The court found that the penalty issue was not ripe for review:

> If the Court were to accept Continental's view of the relevant statutory provision it would be constrained to grant the stay requested, but as the Court reads the provisions of 15 U.S.C. § 45(*l*) in conjunction with the rules and regulations[8] of the Federal Trade Commission, the Commission has the obligation to determine and to inform parties whether and to what extent their conduct may be in violation of a cease and desist order. It is only after the Commission has made such a finding that the penalties contemplated by 15 U.S.C. § 45(*l*) could be assessed, and only from that day forward. Any other interpretation of the statute and regulations would raise serious questions of due process.
>
> In the instant case, the Commission concedes that it has made no decision as to whether plaintiff's conduct violates the cease and desist order. As this Court views the litigation at this preliminary stage, no penalties have accrued

[8] As the government points out in its brief, the court never indicated what rules and regulations of the Commission it was referring to. There are no Commission regulations which require the giving of notice of a violation.

> against which this Court could issue a stay, and thus, there is no justiciable controversy which would render the case ripe and proper for review.
>
> *Continental Baking Co* v. *Dixon*, 283 F. Supp. 285, 287–288 (D. Del. 1968).

Beatrice likewise relies on the dictum of the district court found in *United States* v. *ITT Continental Baking Co.*, No. C–1220 (D. Colo. Aug. 2, 1971), *aff'd*, No. 72–1072–73 (10th Cir. Sept. 24, 1973). That case was also a suit by the government to recover civil penalties and injunctive relief for violations of a consent cease and desist order. Although the district court found that the transactions violated the order, it refused to impose daily penalties based on the "single acquisition" theory (discussed *infra*). With respect to notice, ITT Continental apparently contended that the FTC had to notify it of its intent to certify the case to the Attorney General. The district court rejected this argument; however, it added the following statement:

> Had the Court concluded that the violations were continuing in nature, a determination of the question of whether or not reasonable notice should have been given would be required. In light of the Court's finding in paragraph 7 hereof, this question need not be resolved, but, as obiter dictum, it would seem unreasonable to permit the commission to *knowingly* let daily penalties accrue without giving notice of the commission's position at the earliest reasonable time.
>
> Slip Opinion at 5 (emphasis added).

In affirming the district court, the Tenth Circuit made no mention of the notice issue, presumably be-

534-987—74——3

cause it was unnecessary in light of the court's holding that daily penalties were unwarranted.[9]

Beatrice attempts to bolster its due process argument with the following facts:

(1) On December 9, 1968, the Commission notified Beatrice by letter that it had come to the Commission's attention that Beatrice "may have acquired, directly or indirectly, an interest in Maple Island. . . ." This letter also requested Beatrice to submit all information relevant to the Maple Island transaction and "a detailed statement why, in Beatrice's opinion, the acquisitions or transactions are not subject to the Commission's order."

(2) In January, 1969, Beatrice filed its annual compliance report, in which it referred only to "agreements with independent distributors of Maple Island." This information being inadequate, the Commission, by letter dated April 29, 1969, again requested Beatrice to provide detailed information regarding the

---

[9] The only other case to consider the notice issue in the constitutional sense appears to be *United States v. J. B. Williams Co., Inc.*, 354 F. Supp. 521 (S.D.N.Y.), *appeal docketed*, No. 73-1624 (2d Cir. 1973). Although the court *rejected* the constitutional argument, it appears that the case is distinguishable on its facts:

"If defendants intend by this assertion to claim a violation of their right to due process in this case, the claim is rejected. *The record shows that the FTC informed defendants that the advertisements contained in their first compliance report were in violation of the order.* The Commission took the unusual step of permitting defendants to file a second compliance report. The Commission informed defendants in June, 1969, on the basis of this report, that they were still not in compliance with the order. When, after this notice and after 17 months since the order became final, defendants proceeded to disseminate the advertisements challenged here without prior approval by the Commission, defendants acted at their own peril." *J. B. Williams, supra* at 532-533 (emphasis added).

Maple Island "arrangements." It does not appear in the record that Beatrice ever replied directly to this letter.

(3) On September 12, 1969, the Commission resolved to investigate Beatrice's compliance with the order. By letter of September 12, 1969, the Commission informed Beatrice of the resolution. The letter also rejected Beatrice's 1969 compliance report "for the reason that the Commission is unable to determine from such report the manner and extent of Beatrice's compliance with [the cease and desist] order." The letter further stated that the Commission was of the opinion that the report "raises a real question as to whether the arrangements did not in fact involve fundamental questions of order coverage." Pursuant to the September 12, 1969, resolution, the Commission also ordered Beatrice and Maple Island to file special reports. These reports were filed with the Commission in November, 1969.

(4) On June 17, 1970, the Commission certified to the Attorney General the facts it felt constituted violations of the order. It does not appear from the record that Beatrice was notified of this certification. On the Commission's recommendation, the Attorney General filed suit on October 23, 1970.

In summary, none of the Commission's communications with Beatrice prior to October 23, 1970, unequivocally stated that the Commission felt Beatrice was in violation of the order.[10] At most, the Commission indicated that *possible* violations existed which warranted further investigation. Beatrice urges that this is exactly what *Continental Baking Co.* v. *Dixon, supra,* held to be insufficient notice.

---

[10] As will be discussed, the government specifically informed Beatrice of the Valley Gold (Count II) violation.

The government does not attempt to distinguish *Dixon*, but simply asserts that the decision ignores the statutory scheme.[11] Relying on the previously discussed legislative history, the government argues that the order itself is sufficient notice of the duty it imposes.

We think the basic question necessarily turns on whether the order itself is sufficiently clear to place Beatrice on notice of the prohibited conduct. The question of proper notice, as in cases of statutory construction, depends on whether the order itself is so vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Cf. Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). This same reasoning must apply to construction of the order here involved. Our examination satisfies us that the FTC decree barring Beatrice from acquiring any "interest in" a dairy firm was in fact sufficiently precise in terminology to place Beatrice on notice of its wrongful action in its transactions with Maple Island Dairies. Additionally, one cannot completely ignore the atmosphere and official history surrounding the cease and desist order. We think it obvious, as the trial court concluded, that "the acquisition of the sales volume by Beatrice and the loss of Maple Island as a competitor is the kind of event the order was intended to prevent." Moreover, the delay and alleged uncertainty of the FTC in stating that the transactions were proscribed is attributable in large measure to Beatrice's own procrastination in giving the FTC sufficient information upon which to act. If Beatrice had simply taken the trouble to seek permission of the FTC or

---

[11] The government points to *United States* v. *Ancorp National Services, Inc.*, No. 70 Civ. 5770 (S.D.N.Y. July 30, 1971), where, in a ruling on a preliminary motion, the court characterized *Dixon* as "a misconception of the entire statutory framework."

even to make inquiries whether FTC approval was necessary, much delay could have been avoided.

Litigation continually arises as to the meaning and breadth to be given consent decrees in antitrust cases. *Cf. United States* v. *Armour & Co.,* 402 U.S. 673 (1971); *United States* v. *Atlantic Refining Co.,* 360 U.S. 19 (1959). Simply because a party misconstrues its lawful obligations under such decrees, it is not afforded a legal defense if in law that interpretation turns out to be erroneous. Misunderstanding of the law is no more an excuse under the Clayton Act than anywhere else. In effect, the argument proffered here is similar to the defendant's contention, urged more emphatically in the district court under Count II, that it acted in good faith. We think, as did the district court, that if this has any relevancy at all it is a factor to be considered by the trial court only in measuring or mitigating the penalty.

B. The Offense: Single or Continuing?

The continuing penalty provisions of 15 U.S.C. §§ 21(*l*) and 45(*l*) are virtually identical. Section 21(*l*) provides:

> Each separate violation of any such order shall be a separate offense, *except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.* (emphasis added).

Beatrice argues that here there was no *continuing* violation. Since the consent decree prohibits only "acquisitions"[12] rather than "acquisitions and further holdings," Beatrice argues that it has committed only one violation because an acquisition is an isolated oc-

[12] The relevant portion of the decree is set out in full at p. 4 of this opinion.

currence which is not continuing in nature.[13] The government, on the other hand, argues that an acquisition is a continuing offense until it is undone.

This case is factually similar to *United States* v. *ITT Continental Baking Co.,* No. C–1220 (D. Colo. Aug. 2, 1971), *aff'd,* No. 72–1072–73 (10th Cir. Sept. 24, 1973), wherein the Tenth Circuit adopted the position advocated by Beatrice, *i.e.,* that the FTC order[14] merely proscribed the *acquisition* of assets: "The acquisition itself, and not the *method* of operation thereafter, is the critical factor, and this is the event or incident to which the complaint and the order were directed." Slip Opinion at 5 (emphasis in original).

Such a limited construction of the order ignores the crucial effects of an acquisition and would render nonacquisition orders virtually meaningless.[15] As the government persuasively urges here:

---

[13] Beatrice concedes that an order could be drawn which would prohibit acquisitions *and further holdings;* however, it argues that the order in question was not so drawn. Beatrice does not cite to any nonacquisition orders drawn with what it considers the requisite specificity. The clause in the Beatrice order seems to be the standard nonacquisition language.

[14] The relevant language in the ITT order is identical to that in the Beatrice decree.

[15] The Tenth Circuit stated that the imposition of [single] penalties "does not insulate the *consequences* of the acquisition from further proceedings which remain available to the Government." Slip Opinion at 12 (emphasis added). Although it did not give any indication as to what these further proceedings are, there appear to be only two conceivable alternatives. First, the government could bring a contempt action for violation of the order, in which case the penalties would be within the discretion of the court. However, since the contempt suit and the civil penalty suit are regarded as concurrent remedies (*see United States* v. *Standard Distributors, Inc.*, 267 F. Supp. 7, 10–11 [N.D. Ill. 1967]) equally available to the government, there is no reason to limit the government to the contempt

> For competitive purposes there is nothing intrinsically wrong with the "act of acquisition" in and of itself. *Rather it is the effect of an acquisition, the relationship it creates which may lead to its proscription.* . . . The order's express and agreed terms barred further "acquisitions" and that term plainly had the same meaning as in Section 7 of the Clayton Act. The anticompetitive effects of acquisitions condemned by Section 7 come from the fact that, by holding the assets, the acquiring firm changes the competitive structure of the industry involved. It is the permanent effect of prohibited acquisitions which Congress sought to remedy in the statute. . . . [Any other interpretation] *would convert all orders barring future acquisitions into minor expenses of any acquisition or merger, for the prohibition could be avoided by payment of a $5,000 penalty.* (emphasis added).

In *Gottesman* v. *General Motors Corp.*, 414 F. 2d 956 (2d Cir. 1969), *cert. denied*, 403 U.S. 911 (1971), the court reasoned:

> Here the very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 continued through 1961. *We need not dispute the statement of the district court that, in the ordinary antitrust case, there is no "presumption of continuance of unlawful conduct." Here, however, what was unlawful was du Pont's status as stockholder*

---

action when it is seeking more than $5,000 in penalties. Second, the government could bring a separate action for divestiture (or, as it did here, seek divestiture as another remedy for the order violation). However, divestiture alone is clearly not an adequate alternative. In the present case, Beatrice has enjoyed the benefits of the illegal acquisition since September 1, 1968, and continues to do so to this date since the district court's order was stayed pending appeal.

in General Motors, and that status continued until divestiture.

Id. at 965 (emphasis added).

Similarly, in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), the defendants argued that where the challenged stock acquisition occurred in 1917, the government could not bring suit in 1949 to undo the acquisition since § 7 was applicable only to the acquisition and not to the subsequent holding of the stock. The Supreme Court rejected this argument:

> We repeat, that the test of a violation of § 7 is whether, at the time of the suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints. . . . *The fire that was kindled in 1917 continues to smolder.*
>
> *Id.* at 607 (emphasis added).[16]

In *United States* v. *Schine*, 260 F.2d 552 (2d Cir. 1958), *cert. denied*, 358 U.S. 934 (1959), the defendants were found to have violated an antitrust decree by acquiring interests in theaters without prior court approval. The defendants tried to argue that the statute of limitations on these acquisitions had run; however, the court held:

> [A]lthough the initial acts in contempt of the decree occurred prior to the statutory period, the "illegal" conditions which they created continued up to the date of the order to show cause and resulted in what might be called "continuing contempts."
>
> *Id.* at 555–556.

---

[16] *Gottesman* and *du Pont* each involved § 7 of the Clayton Act. Since the cease and desist order in our case is based upon the 1956 findings of the FTC that Beatrice had violated § 7, interpretations of that statute should be equally pertinent to an interpretation of the consent order.

It is significant that Beatrice does not contest the imposition of daily penalties for the Count II (Valley Gold) failure to divest. As the government points out, the daily penalty provision was thought necessary in the case of divestiture orders because otherwise "an order dissolving an unlawful merger could be ignored after the mere payment of a $5,000 fine." H.R. Rep. No. 580, 86th Cong., 1st Sess. 7. If each day's holding of assets subject to a divestiture order is a separate offense, we think the same should be true of each day's holding of illegally acquired interests.

EQUITABLE POWER OF DISTRICT COURT TO ORDER DIVESTITURE

The district court's order of December 26, 1972, required Beatrice to divest itself:

> absolutely and outright in good faith of all rights, titles, interests, assets and facilities including the use thereof, directly or indirectly acquired by defendant or its agents and subsidiaries in the former so-called northern division or area of Maple Island Dairy as the result of, and arising out of, its arrangements, contracts, or agreements or those of defendant's agents and subsidiaries, with Maple Island Dairy or others.
>
> *United States* v. *Beatrice Foods Co.*, 351 F. Supp. 969, 972 (D. Minn. 1972).

Beatrice complains that the district court lacked authority to enter the above order. Beatrice relies primarily on *Herbold Laboratory, Inc.*, v. *United States*, 413 F. 2d 342 (9th Cir. 1969). In *Herbold*, the Ninth Circuit reasoned that "Congress, in prescribing a civil action for monetary penalties [15 U.S.C. § 45(*l*)], indicated no intent that the equitable powers of District Courts to issue injunctions might also be invoked." *Id.* at 344. The court further observed that:

> When a statute so clearly provides certain, specific sanctions for violations of a Cease and Desist Order, we cannot believe that the courts should reach beyond the statutory provisions and exert a power which, apparently, the Congress has deliberately withheld.
> *Id.*[17]

Here, the district court held that 15 U.S.C. § 45(*l*), "though making no mention thereof, does not attempt to limit the exercise of the court's general equitable powers. . . ." *United States* v. *Beatrice Foods Co.*, 351 F. Supp. 969, 971 (D. Minn. 1972). We find ample authority for this reasoning.

In *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), the Price Administrator brought suit to enjoin a landlord from violating the Emergency Price Control Act and to require him to make restitution to tenants of excess rents collected. The trial court granted the injunction, but denied the restitution

[17] It is significant to note that the *Herbold* court reversed the district court *in toto* because it found that Herbold had not violated the cease and desist order. Moreover, the government had not requested injunctive relief until the time of closing argument before the trial court. The Ninth Circuit discussed the injunctive power question only because it was not sure that "the District Court, had it reached the conclusion that the appellants had not violated the Order, would not have undertaken to enjoin future violations." *Herbold*, *supra* at 344. Thus, the reasoning of the Ninth Circuit with respect to the propriety of injunctive relief was clearly dicta. The rationale of *Herbold* has been rejected by other courts. *See United States* v. *ITT Continental Baking Co.*, No. C–1220 (D. Colo. Aug. 2, 1971), *aff'd*, No. 72–1072–73 (10th Cir. Sept. 24, 1973); *United States* v. *Bostic*, 336 F. Supp. 1312 (D.S.C. 1971), *aff'd per curiam*, 473 F. 2d 1388 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *United States* v. *Vitasafe Corp.*, 234 F. Supp. 710 (S.D.N.Y. 1964), *aff'd per curiam*, 352 F. 2d 62 (2d Cir. 1965).

order because it felt there was no jurisdiction under the statute for restitution.

The Supreme Court reversed, finding that the district court's inherent equitable powers could be used to sustain a restitution order:

> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. *Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.* "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown* v. *Swann,* 10 Pet. 497, 503. See also *Hecht Co.* v. *Bowles, supra,* 330. *Porter, supra* at 398 (emphasis added).

See also Wyandotte Transportation Co. v. *United States,* 389. U.S. 191, 200 (1967); *Mitchell* v. *DeMario Jewelry, Inc.,* 361 U.S. 288, 291–292 (1960); *Culpepper* v. *Reynolds Metals Co.,* 421 F.2d 888 (5th Cir. 1970).[18]

[18] As stated in *Walling* v. *Brooklyn Braid Co., Inc.,* 152 F. 2d 938 (2d Cir. 1945):

"The action taken below was based upon the general powers of courts of equity to grant injunctions and, as in cases between private litigants, the public interest is always to be considered and protected when such a court in the exercise of its sound discretion grants or withholds injunctive relief. *Central Kentucky Gas Co.* v. *Railroad Commission,* 290 U.S. 264, 271, 54 S.Ct. 154, 78 L.Ed. 307; *United States* v. *Morgan,* 307 U.S. 183, 194, 59 S.Ct. 795, 83 L.Ed. 1211. In a case like this it is self-evident that the public interest is directly concerned in the proper enforcement of a valid wage order. Good administration of the statute is in the public interest and that will be promoted by taking timely steps when necessary to prevent violations either when they are about to occur or prevent their continuance after they had begun. *The trial court is not bound*

Finally, we note that the underlying statutory basis for an FTC cease and desist order is § 7 of the Clayton Act. Apropos to our discussion is the Supreme Court's discussion of that section in *United States* v. *E. I. du Pont de Nemours & Co.,* 366 U.S. 316, 328–331 (1961):

> It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7. That statute is specific and "narrowly directed," . . . . The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when §7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated § 7 cases which have been reported, most decreed divestiture as a matter of course. *Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found.* (emphasis added).[19]

---

by the strict requirements of traditional equity as developed in private litigation but in deciding whether or not to grant an injunction in this type of case should also consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted." Id. at 940–941 (emphasis added).

[19] On November 16, 1973, § 5(*l*) of the Federal Trade Commission Act was amended, expressly empowering district courts "to grant mandatory injunctions and such other and further equitable relief as they deem appropriate. . . ." Pub. L. No. 93–153. § 408(c). In a letter to this court, the government has urged alternatively the retroactive applicability of this amendment because of its "remedial" nature. In view of our holding, we need not pass on this question.

COUNT II: THE VALLEY GOLD TRANSACTION

As part of the consent decree, Beatrice was ordered to divest itself of its ownership of certain plants. The relevant portion of the decree reads:

> Beatrice Foods Co., ("Beatrice"), within a period not exceeding eighteen (18) months from the effective date of this order, unless extended, shall divest itself absolutely and in good faith to a purchaser approved in advance by the Commission, of all plants which are owned in whole or in part by Beatrice or operated by Beatrice at Pasadena, California (two plants); Cedar City, Utah; El Paso, Texas; Roswell, New Mexico; Albuquerque, New Mexico; all locations in the State of Arizona; and Morgantown, West Virginia, . . . as may be necessary to restore the properties as competitive entities, all as hereinafter provided.
>
> Provided, however, that this order does not require that the plant, assets, properties and businesses located at Morgantown, West Virginia, be sold to the purchaser of the other plants, assets, properties and businesses described above.
>
> Provided further, however, that if, at the expiration of one year from the effective date of this order, Beatrice establishes that despite its good faith efforts it has been unable to dispose of the plants, assets, properties and businesses described above—other than those located at Morgantown, West Virginia—to a single purchaser, Beatrice may dispose of said plants, assets, properties and businesses to two or more purchasers, approved in advance by the Commission.
>
> As used in this order the term "assets, properties and businesses conducted by Beatrice at or in conjunction with said plants" shall include all dairy distribution stations and branches regardless of where located, which are owned in

whole or in part by Beatrice or operated by Beatrice and supplied by any of said plants.

In the fall of 1967, Beatrice presented for FTC approval an offer to purchase the El Paso dairy and the 18½ stock interest in Valley Gold Dairies, Albuquerque. This offer was rejected by the FTC, presumably because it did not dispose of *all* of the properties in the order to a single purchaser.

In January, 1969, Beatrice presented for FTC approval a plan to sell the four wholly-owned Beatrice properties in El Paso, Texas; Glendale, Arizona; Cedar City, Utah; and Pasadena, California, to a single purchaser. No one but the Valley Gold majority stockholder was interested in purchasing Beatrice's Valley Gold stock. However, this stockholder was *not* interested in all four of the other properties. Thus, it was impossible to sell all five to a single purchaser. Accordingly, the FTC approved the sale of the other four properties to a single purchaser, knowing that the Valley Gold stock was not part of the package. Thereafter the following events ensued:

(1) On March 6, 1969 (after the expiration of the 18-month period of the order), the FTC asked Beatrice to inform the FTC of its efforts regarding compliance with the divestiture order vis-a-vis the Valley Gold stock.

(2) Beatrice initially attempted to have the Valley Gold stock deleted from the order. The FTC denied this petition. In August, 1969, Beatrice therefore requested an extension of time until August 31, 1970, in which to divest the Valley Gold stock.

(3) The FTC denied the extension request, but said no action would be taken against Beatrice if the sale were completed by November 15, 1969.

(4) On November 14, 1969, Beatrice requested an extension until February 15, 1970. The FTC denied

this request on December 12, 1969, and informed Beatrice that it intended to institute enforcement proceedings.

(5) On December 30, 1969, Beatrice requested FTC approval to sell the stock to the estate of the majority stockholder. Approval was given and the sale was actually completed on January 2, 1970.

The district court entered summary judgment for the government on this count as well, assessing penalties from November 15, 1969.

Beatrice argues that the order required timely divestiture of "all *plants* which are owned in whole or in part by Beatrice or operated by Beatrice at . . . Albuquerque, New Mexico." (emphasis added). Beatrice contends that it never owned, in whole or in part, a "plant" in Albuquerque and urges that the trial court erred in equating a minority stock interest with ownership of a plant.

In its answer to the complaint, Beatrice "admits that it was required to divest itself of its interest in . . . Valley Gold Dairies."[20] Thus, there existed no material question of fact with respect to the meaning of the order. The trial court was correct in rejecting this argument.

Beatrice's second contention is that the FTC's approval of the sale of the four properties to a single purchaser constituted a waiver of that portion of the order requiring divestiture of the Valley Gold stock. There is no merit to this argument. Beatrice completely ignores the proviso to the order which reads as follows:

> Provided further, however, that if, at the expiration of one year from the effective date of this order, Beatrice establishes that despite

[20] The trial court also examined internal Beatrice memoranda which it found unequivocally recognized Beatrice's obligation to divest the Valley Gold stock.

> its good faith efforts it has been unable to dispose of the plants, assets, properties and businesses described above—other than those located at Morgantown, West Virginia—to a single purchaser, Beatrice may dispose of said plants, assets, properties and businesses to two or more purchasers, approved in advance by the Commission.

This paragraph simply means that the FTC's approval of the sale of the four properties only relieved Beatrice of the obligation to sell all five to a single purchaser. Beatrice was still required to find a second purchaser for the Valley Gold stock.

It is totally irrelevant that in 1967 the FTC rejected a proposed sale of the El Paso plant and the Valley Gold stock to a single purchaser. The FTC was merely trying to effectuate the purpose of the order, which would have been thwarted by approval of such a sale. The rejection simply meant that Beatrice had to come up with a better package, not that it was excused from further performance.

Beatrice next contends that it was entitled to an additional eighteen months in which to divest the Valley Gold stock from March 6, 1969, the date when, according to Beatrice, it first received notice that it was still obligated to divest the Valley Gold stock. We disagree. Beatrice had notice from the date of the order that it had eighteen months in which to divest all five properties. As discussed earlier, the FTC's approval of the sale of the four properties did not terminate Beatrice's obligation to sell the Valley Gold stock. The divestiture order is clearly divided into two parts: (1) a one-year period in which Beatrice was to attempt to sell all five properties to a single purchaser, and (2) an additional six months in which Beatrice could complete the divestitures by sales to separate purchasers, if need be. Thus, the old order did not become "inoperative" when

the first sale was approved; rather, it simply progressed to the second stage.

Finally, Beatrice raises a good faith defense to the Valley Gold Count. It argues that it was placed in an impossible position because there was only one purchaser interested in the Valley Gold stock, and this purchaser was not interested in the other properties. And, after the approved sale of the other properties, Beatrice still had difficulty completing the Valley Gold sale because of the purchaser's refusal to pay what Beatrice considered a fair price. The trial court properly rejected the good faith argument as a complete defense.[21]

The discretionary nature of the penalties here involved is crucial. Thus, in *United States* v. *H. M. Prince Textiles, Inc.*, 262 F. Supp. 383 (S.D.N.Y. 1966), the court held that good faith is not a defense to an action for civil penalties under § 45(*l*). *Accord, United States* v. *Vitasafe Corp.*, 212 F. Supp. 397 (S.D.N.Y. 1962). In *H. M. Prince,* the court observed that the order's "main objective is to insure the protection of the public which must be protected whether the violations are intentional or not." *H. M. Prince, supra*

---

[21] The court did, however, consider defendant's claimed good faith when it assessed penalties at the rate of $200 per day, rather than the $5,000 per day requested by the government. Judge Neville observed:

"The court has some sympathy as a business proposition with defendant's difficulty in finding a ready market for a minority stock interest in a closed corporation, particularly where the principal stockholder of the corporation became deceased. The court also recognizes defendant did divest itself of its other properties as required and eventually of the Valley Gold stock, though some 49 days too late and beyond the last extension of time."

United States v. *Beatrice Foods Co.*, 351 F. Supp. 969, 971 (D. Minn. 1972).

at 388. Thus, we conclude, as did the district court, that good faith is only relevant to the severity of the penalty to be assessed.

The trial court's judgment on both counts is affirmed.

A true copy.

Attest: ——— ———,

Clerk, U.S. Court of Appeals, Eighth Circuit.

No. 73-1290

IN THE

Supreme Court of the United States

October Term, 1973

United States of America, *Petitioner*

v.

ITT Continental Baking Company, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

John H. Schafer
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorney for Respondent

Of Counsel:

David J. Cynamon
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

April 1974

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1290

UNITED STATES OF AMERICA, *Petitioner*

v.

ITT CONTINENTAL BAKING COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the courts below were correct in holding that a negotiated Federal Trade Commission consent order which requires a firm to "cease from acquiring . . ." assets of other firms in the same industry, but which does not bar "holding" such assets, does not provide a basis for assessing daily penalties under the Clayton and Federal Trade Commission Acts (15 U.S.C. §§ 21(*l*), 45(*l*)) for "holding" assets "acquired" in violation of the consent order?

2. Whether a negotiated Federal Trade Commission consent order which bars a firm only from "acquiring, directly or indirectly . . . the whole or any part of the . . . assets of any concern . . . engaged in the production and sale of bread" is violated by a firm which enters into a contract to supply bread to a producer and seller of bread who unilaterally decides to terminate production of bread and remain in business as an independent distributor?

3. Whether a negotiated Federal Trade Commission consent order which does not by its terms apply to "successors" may nevertheless be applied to a previously unrelated successor firm, where that firm acquires the firm subject to the order pursuant to an arms-length transaction causing substantial changes in ownership and control, and such acquisition is entered into without any purpose to evade the obligations under the order?

4. Whether the Federal Trade Commission may assert accumulating daily penalties for periods long after it has completed its investigation, and after it has concluded that its consent order is being violated every day, without informing the alleged violator of its jeopardy?*

STATEMENT OF THE CASE

1. Events Leading to the Court Proceedings

The consent order at issue in this case was the result of a complaint brought in 1960 by the Federal Trade Commission, pursuant to Section 7 of the Clayton Act, to secure divestiture of certain acquired companies,

* Questions 2-4 are necessarily involved in the Government's effort to sustain and expand the judgment below.

and for other relief. (App. 57a-67a)[1] Prior to any findings in the case, Continental and complaint counsel agreed to a proposed consent order (App. 69a-71a) which was adopted without change by the Commission in May 1962. (*See* App. 79a-84a) Divestiture of certain assets was agreed to, and the consent order also prohibited Continental from "acquiring, directly or indirectly, . . . the whole or any part of the stock, share capital, or assets of any concern . . . engaged . . . in the production and sale of bread and bread-type rolls" unless it obtained the prior approval of the Commission. (App. 83a) Nowhere did the order prohibit the holding, as opposed to the acquisition, of such assets, nor did the order prohibit the acquisition of firms engaged only in sales, or only in production, of bread products.[2]

In 1965 Continental, without prior Commission approval, entered into an agreement with the Mack Baking Company ("Mack") of Bangor, Maine, by which Mack became a distributor of Continental bread products. (App. 131a-133a) Mack was at the time a producer and seller of competing bread products. The Commission has never challenged this agreement nor

---

[1] "App." refers to the appendix filed in the court of appeals, a copy of which has been provided by the Government in conjunction with its Petition.

[2] The Government relies heavily on an "appendix" to the agreement containing the consent order (App. 72a-78a). Petition, at 5, 15. This appendix was never adopted by the Commission (*see* App. 81a, ¶¶ 6-7), but rather, as the face of the document makes clear, was written by staff attorneys supporting the complaint to persuade the Commission to approve the consent order. The appendix therefore reflects neither the opinions nor the purpose of Continental in agreeing to the consent order, and is irrelevant to the interpretation of that order. United States v. Armour & Co., 402 U.S. 673 (1971).

suggested that it was in any way a violation of the consent order. (App. 48a)

Subsequently, in 1965 and 1966 Continental entered into similar agreements with three small western baking companies, Bon Ton, Inc. ("Bon Ton"), Wyoming Baking Company ("Wyoming"), and Sheppard Baking Company ("Sheppard"). (App. 19a-47a) The owners of each of these companies had unilaterally decided, due to economic and personal problems (App. 27a, 45a), to terminate bread production but to remain in the bread business as distributors. The agreements each provided that Continental would supply bread products to the three companies for resale on their own routes and to their own customers. (App. 28a, 36a, 45a-46a) None of the companies was competing with Continental when the agreements were made. The result of the agreements was that none of the three bakers was eliminated from the market as they would have been without Continental's supply contracts. Each maintained its own routes, its own customers, and full control over sales and employment policies.[3]

On September 13, 1968, Continental's business operations and assets were merged with a wholly-owned subsidiary of International Telephone and Telegraph Corporation ("ITT"), called ITT Continental Baking Company ("ITT Continental"). (App. 23a) This merger, which was an arms-length transaction, resulted

---

[3] In 1967 independent circumstances affecting the owners of the Bon Ton and Wyoming dealerships led them to sell the dealerships to Continental in return for cash or cancellation of indebtedness. (App. 31a, 42a-44a) At the time of the sales, neither firm was engaged in the "production and sale" of bread products. Sheppard continues to operate as an independent dealership, but is no longer supplied by Continental.

in a complete change in ownership and control of Continental. (App. 24a-25a) It is stipulated that the merger was in no way entered into for the purpose of evading the obligations of the consent order. (App. 25a)

2. The Court Proceedings

Continental submitted compliance reports to the Commission in 1966 and January 1967 stating that it had not made any acquisitions barred by the terms of the consent order. (App. 122a-126a) The Commission engaged in a fact-finding investigation of the agreements described above which was completed by June 1967, and Continental voluntarily kept the Commission informed concerning relevant developments respecting the distributorships. (App. 47a-48a) Nevertheless, Continental was never informed that any of the agreements were considered to be "acquisitions" in violation of the consent order until the present action was brought in December 1968. (App. 48a) Despite the Commission's failure to inform Continental of its jeopardy, the Government in the present suit demanded daily penalties of $1,000 against Continental from the date of the agreement with each company to the date of the filing of the complaint. (App. 5a-12a) The Government also requested divestiture. (App. 135a)

On the basis of the stipulation of facts filed by the parties (App. 19a-56a), the district court found that the consent order could be "reasonably read" to permit the three challenged contracts, but that the Bon Ton and Wyoming agreements constituted "acquisitions" in violation of the order. (Petition, App. C, p. 14A) The apparent basis for this finding was that the agreements resulted in the acquisition of "assets"—the sales routes and sales volume of the companies—even though

these "assets" were not transferred to Continental. The Sheppard transaction was distinguished on the grounds that no "consideration" had been given by Continental, despite the fact that both Continental and the Commission argued that all three transactions were identical. (Petition, App. C, pp. 14A-15A) The district court then imposed separate statutory penalties of $5,000 each on Continental for the Bon Ton and Wyoming alleged "acquisitions." (Petition, App. C, p. 16A) The district court found that the terms of the consent order prohibited acquisitions only and therefore rejected the Commission's demand for daily penalties. (Petition, App. C, p. 15A)[4] It also refused to order divestiture but entered an injunction in the language of the consent order. (Petition, App. C, pp. 15A-16A)

The court of appeals reversed the district court as to the Sheppard transaction, but otherwise affirmed. (Petition, App. A, pp. 9A-10A) With respect to the issue of daily penalties, the court held:

> "The only reference in the order is to the 'acquiring' of such businesses [engaged in the production and sale of bread products] . . . .
>
> "This consideration of the order leads us to agree with the trial court as to whether the violations found were continuing or not . . . .
>
> * * *

---

[4] The district court also stated that it would appear "unreasonable to allow the commission to knowingly let daily penalties acrue without giving notice of the commission's position at the earliest reasonable time." However, the court found it unnecessary to resolve this issue definitively since on its reading of the consent order there was no basis for daily penalties. (Petition, App. C, p. 15A)

"... [T]he scope of a consent decree must be discerned within its 'four corners,' *United States* v. *Armour & Co.,* 402 U.S. 673, and must be construed 'as it is written.'" (Petition, App. A, pp. 4A, 9A)

ARGUMENT

In this case the Government asks this Court to review the refusal of the lower courts to assess daily penalties for allegedly improper acquisitions. It alleges that the decision below would hamper the Commission's enforcement programs and that the decision conflicts with the recent decision of the Court of Appeals for the Eighth Circuit in *United States* v. *Beatrice Foods Co.,* No. 73-1120 (8th Cir., March 8, 1974).[5] The controversy turns solely upon the construction of particular language used in an FTC consent decree. For several reasons the case does not warrant plenary review in this Court.

First, the Commission can resolve the problem in the future merely by making a simple change in the wording of its decrees to make them apply specifically to the "holding" as well as the "acquiring" of companies. While the Government asserts that other outstanding decrees have already used the language construed by the lower courts in this case, the FTC is empowered to "modify" existing decrees in the public interest through appropriate proceedings. 15 U.S.C. § 45(b). Consequently, the agency can readily prevent any repetition of this problem without occupying the time of this Court.

Second, the Government's argument on the merits is essentially the same as the argument that it made, and

---

[5] The *Beatrice* decision was relied upon in the supplemental memorandum recently filed by the United States.

that this Court only recently rejected, in *United States* v. *Armour & Company,* 402 U.S. 673 (1971). There, as here, the Government in substance sought by interpretation to expand a consent decree beyond its language on the ground that it would serve regulatory purposes to prohibit conduct that the decree did not expressly reach. *Armour* correctly rejected this approach in construing bargained-for consent decrees; the lower courts in this case followed *Armour;* and there is no necessity for further review of the now settled principle established in *Armour* by this Court.

I.

In *Armour* the Government sought to prevent the Greyhound Corporation, which engaged in certain retail food businesses, from acquiring the stock of Armour, a major meatpacker, which was subject to a consent decree prohibiting it from engaging in those same retail food businesses. The Government argued that the "purposes" of the decree would be "frustrated as much by a retail food company's acquisition of a meatpacker as they would be by a meatpacker's entry into the retail food business." 402 U.S. at 681. The Court did not dispute this claim, but rejected the argument on the following basis:

> "If the parties had agreed to such a prohibition, they could have chosen language that would have established the sort of prohibition that the Government now seeks."
>
> * * *
>
> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms .... Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties

> have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." 402 U.S. at 679, 681-82.

Here, just as in *Armour,* the Government argues that interpreting the consent order to prohibit only "acquisitions" and not "holding" the assets so acquired "frustrates the basic purpose of the order." Petition, at 13. Assuming *arguendo* that the interpretation of the order by the lower courts in this case might frustrate the *Commission's* purpose in adopting the consent order, it cannot be said to frustrate the purposes of the consent order itself. The order explicitly prohibits Continental only from "acquiring . . . assets . . . ." Where the Government has wished to prohibit companies from holding as well as acquiring assets, and the defendant has agreed, the consent orders have so stated. *E.g., United States* v. *General Motors Corp.,* 1968 Trade Cas. ¶ 72,356 (N.D. Ohio 1968). No amount of argument about the "reasons" or the "purpose" for barring acquisitions (Petition, at 12-15), can change the fact that the negotiations between Continental and the Commission resulted in a consent order which barred only acquiring, not both acquiring *and* holding, assets.[6]

---

[6] The Government's citation of United States v. DuPont & Co., 353 U.S. 586 (1957) (Petition, at 13-14) in this regard is inapposite. In that case, the Court held only that the question whether DuPont's acquisition of General Motors Stock in 1917 violated the original Clayton Act could be determined by reference to later developments. 353 U.S. at 497-98. The Court did not decide that DuPont's "holding" of the previously acquired stock was a violation in itself, which is the necessary implication of the Government's position here. Furthermore, as *Armour* makes clear, questions of what Section 7 of the Clayton Act does or does not prohibit are completely irrelevant to questions of the proper interpretation of a specifically limited consent order.

The Commission cannot now rewrite the bargain struck in 1962 by asking this Court to "interpret" the order so as to include new prohibitions—the precise approach disapproved in *Armour*. The decisions of the courts below are manifestly in accord with the principles of *Armour,* and the question posed by the Government is insubstantial in light of this Court's own recent pronouncement.

The importance of the court of appeals' decision to Commission enforcement has also been greatly overstated by the Government. The contention that the decision will harm the Commission's enforcement program by removing the possibility of substantial penalty assessments against violators (Petition, at 11), necessarily assumes that respondents to orders regulating acquisitions are eager to violate the terms of those orders as soon as the monetary penalties become small enough. Such an assumption of eager interest to violate the law is unjustified as a general rule and is unsupported by the record of the present case, where the district court expressly found Continental's actions were based on a "reasonable" reading of the consent decree. See p. 5, *supra.* Moreover, this present order has had no legal effect since at least May 1972, and there have been no acquisitions in those two years.

The professed fears of the Government in this regard are especially unpersuasive in view of its own assumption that divestiture may be granted by a court in a civil penalty proceeding. Petition, at 11. Although the Government argues that divestiture is not a sufficient deterrent, it cannot be seriously claimed that divestiture of a profitable acquisition is not as costly and drastic a remedy as are daily monetary penalties.

Coupled with an initial penalty for an improper acquisition, the remedy of divestiture in appropriate cases gives the Government an ample arsenal of sanctions.

Moreover, the Commission has ample power to secure the ends it seeks without a retroactive expansion of the existing decree and without further litigation in this Court. With respect to all future decrees, the Commission is free to include a precise prohibition against "acquiring or holding" forbidden assets in any decree it drafts after any agency proceeding and to insist on such a prohibition before it agrees to a consent order. Any company entering into a consent decree of this type will at least have fair warning of its potential liability.

The Government asserts that there are 66 outstanding orders using language similar to the decree in this case. However, the Commission has authority to "modify" existing decrees after appropriate proceedings and could thus move to introduce an "acquiring or holding" prohibition into existing decrees where circumstances warranted.[7] Such an outright modification, however, would necessarily apply to subsequent acquisitions and would not have the unfair retroactive effect of the Commission's present "interpretative" approach.

In fact, policy considerations, invoked here by the Government, militate far more strongly against the Government's position than for it. The Government's claim here for daily penalties up to the date of the complaint is based upon a substantial unilateral rewriting

---

[7] The Commission is presently considering a purported "modification" of the consent order here involved to extend its term to April, 1977. ITT Continental is opposing this "modification" on grounds not presented by an "acquiring or holding" clause.

of terms of a bargained-for consent order. See pp. 14-15, *infra*. If a company knows that a consent decree can be rewritten and applied retroactively whenever the Commission later contends that the limitations do not serve the Commission's purpose, the company will have a strong incentive to litigate in the first instance rather than compromise. Inasmuch as consent decrees constitute a primary antitrust enforcement mechanism of the Commission,[8] even a small disincentive to negotiating such decrees would have significant adverse effects on the Commission's program.

In its supplemental memorandum the Government urges that certiorari should be granted because of a conflict assertedly created by the recent decision of the Eighth Circuit in *United States* v. *Beatrice Foods Co.*, *supra*. In this instance the asserted conflict does not justify review both because the controversy is not likely to recur and because the Commission can readily eliminate the problem entirely by administrative action. As already noted, the questions raised by cases such as this involve no issue of statutory construction but simply the interpretation of consent orders of limited scope. As only a limited number of similar orders exist, the decision will have little practical effect in the future. The precise question here presented is, in fact, unlikely ever to arise again.[9]

---

[8] As indicated by the preponderance of consent decrees among the 66 orders listed in the Petition, App. E. See also Note, Flexibility and Finality in Antitrust Consent Decrees, 80 Harv. L. Rev. 1303 (1967).

[9] So far as ITT Continental is aware, the present dispute has arisen only in this case and in *Beatrice* despite many years of Commission enforcement of decrees containing similar language. And it would be both remarkable and perverse if the Commission fails to insist on broader language, to prohibit both "acquiring" and "holding," in its future decrees.

As we have previously shown, moreover, the Commission can readily resolve any enforcement problems allegedly created for it by the Tenth Circuit's decision by drafting future anti-acquisition orders to reach the conduct it here seeks to proscribe. With respect to existing orders, it may employ the statutory procedures to modify them without resort to this Court. In short, the asserted conflict between the courts of appeal is essentially a matter of academic interest. The effect of either decision is quite limited and even that small effect can be eliminated by appropriate Commission action and without further litigation in this Court. This Court should not grant certiorari simply to allow the Government to rewrite the consent order "as it might have been written." *United States* v. *Armour & Co.*, *supra*, at 682.

II.

If, contrary to our contention that the question presented by the Government does not warrant plenary review, the Court should grant certiorari, certain other issues will become prerequisite to the Government's attempt to sustain and expand the judgment below. The first is whether the three supply contracts were a violation of the consent order against acquisitions. The second and third relate to the period for which daily penalties could be asserted. Obviously, if the supply contracts were not an act of "acquiring," they would also not be an act "holding," and no daily penalties could be assessed. To the question we now turn briefly.

The supply contracts with Bon Ton, Wyoming, and Sheppard were held by the court of appeals to be violations of the consent order because the exclusive dealerships were "effective to induce the owner to close the local bakery," enabling Continental to obtain "the

market and volume . . . a principal asset of the bakery." Petition, App. A, p. 7A. Beyond the fact that the record is devoid of any evidence that Continental "induced" any of the bakers to cease production, the decision that a supply contract for a limited term constitutes an illegal acquisition of market and sales volume is directly contrary to the plain meaning of the words of the consent order, and to the position taken by the Commission itself in other cases. *E.g., National Dairy Products Corp.* (FTC Dkt. 6651, 1969). Where the Commission has sought to prevent companies from engaging in the type of supply contracts entered into by Continental, it has negotiated consent orders which include explicit prohibitions of such contracts. *E.g., Textron, Inc.* (FTC Dkt. C-1740, May 22, 1970);[10] *Frito-Lay, Inc.* (FTC Dkt. 8606, Sept. 12, 1968);[11] *Hercules, Inc.* (FTC Dkt. C-1794, Sept. 23, 1970).[12] No such provisions were included in the present consent order.

Thus, as with the question of "holding" assets, the Government is again forced to argue that "acquiring" does not mean what it says, but rather that the term covers the mere entry into a supply contract with a firm that has unilaterally ceased production of its own products. There is even less justification for distorting

---

[10] Respondent prohibited from obtaining "in whole or in part, the market share of any such concern."

[11] Prohibition applied where "such concern discontinues producing any of said products under a brand name or label owned by such concern and thereafter distributes any of said products under any of respondent's brand names or labels."

[12] Prohibition applied where "such concern discontinues the production of any of said products and thereafter transfers or makes available to respondent its customer lists or customer accounts."

the plain meaning of the consent decree in this respect than there is with regard to the penalty issue. Even if the Court accepted the Government's contention that the "purpose" of the order must be considered in establishing its scope, an examination of the order, the complaint on which it is based, and the appendix to the initial agreement will reveal no expression of intent by either party to prohibit the supply contracts here in question. Although in considering the penalty issue the court of appeals recognized that *Armour* prohibited such expansive interpretations of consent orders, it failed to apply the same principles to the initial question of whether a violation had occurred at all.[13]

The Government's claim for daily penalties necessarily involves two further issues: (1) whether the consent order was binding on Continental's successor after Continental ceased to exist; and (2) whether the Commission may lawfully allow claims for daily penalties to pile up without putting the alleged violator on notice of its jeopardy.

The district court's holding that the consent order was binding on Continental's successor creates another flat conflict with the holding in *Armour*. In that case, as has been seen, the Court held that a consent decree must be strictly construed according to its terms. Be-

---

[13] There is some suggestion that the courts below relied on Continental's eventual acquisition of the Bon Ton and Wyoming distributorships to find a violation of the consent order. Petition, App. A., pp. 5A-6A; App. C, p. 14A. To the extent that this is so, the decisions are clearly inconsistent with *Armour*. At the time of the acquisition of these distributorships, they were no longer involved in the "production and sale" of bread products. The consent order is unquestionably limited to such concerns, and thus neither Bon Ton nor Wyoming could reasonably be held to fall within the prohibitions of the order.

cause the decree did not purport to apply to "successors and assigns," its prohibitions could not be applied to Greyhound, the successor to defendant's stock. 402 U.S. at 680. The consent order here applied only to Continental, and nowhere mentioned its "successors and assigns." This omission should have been dispositive of the question, in accord with *Armour,* particularly in view of the Commission's ability to include such a clause where it intends the order to apply to successors. *E.g., Cole National Corp.,* 71 F.T.C. 1504, 1510 (1967).

Instead of following *Armour,* the district court held that ITT Continental, in its merger contract with Continental, had "assumed the liabilities of Continental . . . including the liabilities under the Federal Trade Commission consent order." Petition, App. C, p. 16A. The agreement, however, cannot be read to extend the application of a consent order which would not otherwise have applied. Such a reading, which in essence makes the Commission a third-party beneficiary to the merger contract, would require a clear showing that ITT Continental intended gratuitously to confer such a benefit upon the Commission. No such showing was made in this case.

Beyond its incompatability with the *Armour* decision, the district court's ruling deviates from a long line of precedents which holds that a firm cannot be bound by an order entered against its predecessor unless there is substantial continuity of ownership and management so that the successor appears to be merely a means of avoiding the order's requirements. *E.g., Walling* v. *Reuter,* 321 U.S. 671 (1944); *NLRB* v. *Tempest Shirt Manufacturing Co.,* 285 F.2d 1 (5th Cir. 1960); *P. F.*

Collier & Son, Corp. v. *FTC,* 427 F.2d 261 (6th Cir.), *cert. denied,* 400 U.S. 926 (1970). The undisputed facts of the present case illustrate that such considerations are not even remotely applicable, for there was a complete change of ownership and control of old Continental as a result of the 1968 acquisition, and it is stipulated that the merger was not an effort to avoid the prohibitions of the consent order.

Lastly, the term for which daily penalties could be applied depends on whether the Commission may lawfully assert daily penalties for a period during which it has had available all the relevant facts pointing to an alleged violation and has needlessly allowed those penalties to accumulate by failing to advise the private party of its fast-increasing potential liability. In violation of its own practice and procedures,[14] the Commission here failed to inform ITT Continental of its alleged violation of the order until the enforcement proceeding was initiated, despite the fact that the Commission had completed its investigation of the transactions over one year previously, and had decided to bring the penalty action at least four months prior to its initiation. ITT Continental was thus denied the opportunity to limit the accrual of substantial penalties by anticipating the penalty action with a declaratory judgment action of its own or by other appropriate means. See, *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 225-26 (1961).

[14] Where, as here, compliance reports have been accepted by the Commission, its own rules require notification to a respondent if the Commission subsequently comes to believe that a violation of the order exists. 16 C.F.R. § 3.61(d). Interestingly, after the district court's decision in this case, the Commission amended its rules to provide for the first time that it may institute enforcement proceedings "without prior notice of any kind to a respondent . . . ." FTC Rule 3.61(a), 37 Fed. Reg. 5610 (1972).

Continental took just such an approach on another matter in *Continental Baking Co.* v. *Dixon,* 283 F. Supp. 285 (D. Del. 1968), and the court there held that:

> "the Commission has the obligation to determine and to inform parties whether and to what extent their conduct may be in violation of a cease and desist order. It is only after the Commission has made such a finding that the penalties contemplated by 15 U.S.C. § 45(1) could be assessed, and only from that day forward. Any other interpretation of the statute and regulations would raise serious questions of due process." *Id.* at 287-88.

Elementary fairness forbids the notion that the Commission may sit quietly with full knowledge of all relevant facts and then assert daily penalties for an allegedly "continuing" violation. Before the substantial penalties demanded by the Government here may be imposed, this issue must be resolved.

Finally, an additional serious question of due process is raised by the Government's attempt to collect daily penalties for conduct that Continental reasonably did not suppose to come within the decree's ban as actually written. This Court has held that a penalty may not be imposed where the Government standard is such "that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287 (1961), *quoting from, Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). See also *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966). The district court here explicitly found that "competent counsel could reasonably read [the order] as not prohibiting" the supply contracts, and the court of appeals did not dispute this finding. In fact, the lower courts'

conclusion that the supply contracts violated the consent order involved a substantial departure from the terms of that order. Were the Government to prevail, ITT Continental would be liable for substantial penalties for violation of an order as to which "men of common intelligence" could differ without having received any notice whatever that a new interpretation was contemplated. Fundamental considerations of fairness must surely prohibit such a result.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN H. SCHAFER
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorney for Respondent ITT Continental Baking Company, Inc.

Of Counsel:

DAVID J. CYNAMON
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

April 1974

B

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1290

UNITED STATES OF AMERICA, PETITIONER

v.

ITT CONTINENTAL BAKING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

---

1. In our petition we noted that the Tenth Circuit's ruling that the prohibited acquisitions constitute single rather than continuing violations of the Commission order threatens seriously to impair the effectiveness of 66 similar orders (Pet. 9-12). Respondent appears to recognize this problem (Br. in Opp. 7), but asserts that the Commission "can readily prevent [its] repetition" by initiating proceedings to modify these orders to include an express ban on "holding" properties acquired in violation of their terms (Br. in Opp. 7, 11, 12). Moreover, respondent asserts that in view of the Commission's statutory power to modify the existing orders, the conflict between the Tenth Circuit's ruling and the Eighth Circuit's ruling in *United States* v. *Beatrice Foods Co.*, No. 73-1120, decided March 8, 1974,[1] on the continuing violation issue "is essentially a matter of academic interest" (Br. in Opp. 13).

---

[1]See Supp. Memo for the United States.

However, if the Tenth Circuit's decision is permitted to stand, any effort by the Commission to modify the existing orders to make them effective would likely result in further litigation. For the firms subject to such consent orders undoubtedly would oppose modification, arguing, on the basis of the Tenth Circuit's decision, that it would alter the "bargain" they struck with the Commission in negotiating their orders. The Commission would then be required to relitigate the question presented in this case, on which the Tenth and Eighth Circuits are in conflict.[2]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

---

[2]Respondent contends (Br. in Opp. 2, 13-19) that if the petition for a writ of certiorari is granted, it will be necessary to consider three issues in addition to the issue presented in the petition: (1) whether the agreements between Continental and the three local bakeries constituted acquisitions prohibited by the order; (2) whether ITT Continental is a "successor" to Continental and assumed its liabilities under the order; and (3) whether daily penalties may be assessed for the period after the Commission learns that its order is being violated but does not provide notice to the party that it is violating the order.

Respondent has not filed a cross-petition for a writ of certiorari and it is unnecessary to reach any of these questions in order to determine whether prohibited acquisitions constitute single rather than continuing violations. Therefore, none of these questions is properly before this Court. See, *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines,* 409 U.S. 48, 52, n. 4; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381, n. 4. Moreover, neither the district court nor the court of appeals ruled on the "notice" issue, because it held that the prohibited acquisitions were not continuing violations.

DOJ-1974-04

INDEX

CITATIONS

In the Supreme Court of the United States

October Term, 1973

No. 73–1290

United States of America, petitioner
v.
ITT Continental Baking Company

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A–10A) is reported at 485 F. 2d 16. The district court's findings of fact and conclusions of law (Pet. App. 12A–16A; 1972 CCH Trade Cases, ¶73,993) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11A) was entered on September 24, 1973. On December 17, 1973, Mr. Justice White extended the time for filing a petition for a writ of certiorari to January 22, 1974. On January 14, 1974, the time for filing was further extended by Mr. Justice White to and including Febru-

ary 21, 1974, and the petition was filed on that date. The petition was granted on April 29, 1974 (App. 135). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a firm which violates a Federal Trade Commission consent order prohibiting acquisitions is subject, under the civil penalty provisions of the Clayton and Federal Trade Commission Acts (15 U.S.C. 21(*l*), 45(*l*)), to daily penalties for each day it continues to hold the unlawfully-acquired assets.

STATUTES INVOLVED

Section 11(*l*) of the Clayton Act (38 Stat. 734, as amended, 15 U.S.C. 21(*l*)) provides:

> Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.

Section 5(*l*) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45(*l*)) provides:[1]

[1] Subsequent to the decision below, Congress amended Section 5(*l*) of the Federal Trade Commission Act by increasing the amount of the maximum civil penalty for each violation of a

> Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

Section 7 of the Clayton Act (38 Stat. 731, as amended, 15 U.S.C. 18) provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Commission order from $5,000 to $10,000, and by expressly empowering district courts to grant equitable relief in civil penalty cases. P.L. 93-153, Section 408(c), 87 Stat. 591.

STATEMENT

1. THE COMMISSION PROCEEDINGS AND CONSENT ORDER

In 1960 the Federal Trade Commission issued an administrative complaint (App. 61–71) against Continental Baking Company ("Continental"). The complaint charged, *inter alia,* that Continental's acquisitions of several baking companies violated Section 7 of the Clayton Act (38 Stat. 731, as amended, 15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45).[2]

The complaint alleged, *inter alia,* that the acquisitions "substantially lessened actual and potential competition throughout the country in the manufacture, sale and distribution of bread;" "eliminated [the acquired firms] * * * as independent competitive factors in the manufacture, sale and distribution of bread;" and "significantly increased the trend to industry-wide concentration of the manufacture and sale of bread" (App. 67–68).

Two years later, while the proceeding was still before the hearing examiner, the parties agreed (App. 72–84) to settle the case by a proposed consent order. Under the order, Continental agreed not to make further acquisitions in the bread industry for ten years without the Commission's prior approval and to divest one of the baking firms it had acquired.

[2] Section 5(a)(1) of the Federal Trade Commission Act declares unlawful "[u]nfair methods of competition in commerce, and unfair * * * acts or practices in commerce * * *."

In an appendix specifically incorporated by reference into their agreement to terminate the litigation by adoption of the consent order, the parties stated that "[o]ne of the principal problems in the baking industry is the tendency towards concentration and the continuous growth of major baking companies through acquisition. Such acquisitional growth and tendency towards concentration places in the hands of a few large companies the means to set the pattern of competition, not only among themselves, but also for all local baking companies serving any given area" (App. 84). If the proposed order were adopted, the parties said, Continental's "alleged continuous practice of acquiring companies baking and selling bread * * * will be brought to a halt" (*ibid.*). The parties also agreed that "[t]he complaint may be used in construing the terms of the order" (App. 73).

As recommended by the hearing examiner (App. 85–89), the Commission, in May 1962, approved the agreement and adopted the consent order (App. 32).

The order prohibited Continental for 10 years "from acquiring, directly or indirectly, * * * the whole or any part of the stock, share capital, or assets of any concern * * * engaged * * * in the production and sale of bread" without the Commission's prior approval.[3]

---

[3] The section of the order barring acquisitions provides in full (App. 32):

> It Is Further Ordered, That for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and desist from

2. THE COURT PROCEEDINGS

a. *The district court proceeding.* After the cease-and-desist order became final, Continental, without obtaining the Commission's prior approval, entered into agreements with three independent producers and sellers of bread by which Continental acquired their market share or sales volume.[4] In December 1968, pursuant to the Commission's recommendation, the United States brought this suit under Section 11(*l*) of the Clayton Act and Section 5(*l*) of the Federal Trade Commission Act, alleging that Continental's transactions with the three local bakeries violated the order's

> acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or noncorporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission.

The order also required Continental to divest one of the baking firms it had acquired. Continental complied with that provision, and it is not involved in this case.

[4] The three transactions which the court of appeals held constituted acquisitions prohibited by the order are summarized in the court of appeals' opinion (Pet. App. 4A–7A), and are set forth in greater detail in the stipulation of facts the parties submitted to the district court (App. 35–51). Respondent did not cross-petition for a writ of certiorari to review the court of appeals' holding that the three transactions challenged in the complaint violated the order. Whether the challenged transactions violated the order, therefore, is not before the Court in this case, and we do not address it in this brief. See *infra*, p. 25.

ban on acquisitions.[5] The complaint (App. 14–20) sought civil penalties of $1,000 per day from the date of each acquisition to the date the complaint was filed, an injunction commanding future compliance with the order, and such further relief as the court deemed appropriate.[6]

The case was submitted to the district court upon stipulated facts (App. 29–60). The court held that Continental's transactions with two of the three firms constituted acquisitions prohibited by the order, but that its transactions with the third firm did not (Pet. App. 14A–15A).

The district court denied the government's request for daily penalties for the acquisitions it held unlawful. The court concluded "that the terms of the consent order proscribe only the act of acquisition and that the violations of the consent order * * * did not constitute a 'continuing failure or neglect to obey' said order [within the meaning of the civil penalty statutes]. * * * Once these two acquisitions were accomplished, the violations were complete" (Pet. App. 15A).[7]

---

[5] In September 1968, shortly before the complaint was filed, Continental merged with International Telephone and Telegraph Corporation ("ITT"). Pursuant to the merger agreement Continental ceased to exist, and its business has since been conducted by ITT Continental Baking Company ("ITT Continental"), a wholly-owned subsidiary of ITT, created for that purpose (App. 32–34). The suit was therefore brought against ITT Continental.

[6] The government later specifically requested divestiture (App. 26–27).

[7] Other issues presented to the district court were whether the Commission is required to notify a person subject to an

The court imposed the maximum single civil penalty of $5,000 for each of the two "separate" violations it found, and entered an injunction commanding ITT Continental to comply with the terms of the consent order until it expired [8] (Pet. App. 16A, 17A). It

---

order that it is in violation of the order before continuing penalties may be imposed; whether the district court had the power to grant injunctive relief in a civil penalty proceeding; and whether ITT Continental is a "successor" to Continental and assumed Continental's liabilities under the order (see App. 26–28).

Since the district court ruled that the violations were not continuing, it did not rule on the notice issue, but expressed the view that it would seem unreasonable for the Commission knowingly to permit daily penalties to accrue without giving notice of its position at the earliest reasonable time (Pet. App. 15A).

The court held that it had the power to grant equitable relief (*id.* at 15A–16A). As noted above (*supra*, n. 1), Congress has since expressly authorized district courts to grant such relief in Section 5(*l*) civil penalty actions.

Finally, the court ruled that ITT Continental is a successor of Continental and that ITT Continental "assumed the liabilities of Continental Baking Company including the liabilities under the Federal Trade Commission consent order" (Pet. App. 16A).

[8] The consent order was scheduled to expire by its own terms on May 15, 1972, and the district court's injunction ran only until that date.

In April 1972, the Commission issued an order requiring ITT Continental to show cause why the order's ban on acquisitions should not be extended until April 1977. On December 12, 1973, following hearings, the administrative law judge filed an opinion recommending that the ban on acquisitions be extended to April 13, 1977. The case is currently pending before the Commission on ITT Continental's appeal.

declined, however, to order ITT Continental to divest the assets acquired in violation of the order.

b. *The court of appeals' decision.* Both parties appealed. The court of appeals reversed the district court's ruling that Continental's transactions with the third firm did not constitute an acquisition in violation of the order and remanded the case to the district court for the imposition of an appropriate "single" civil penalty for that violation. It affirmed in all other respects.[9]

The court of appeals, citing *United States* v. *Armour & Co.*, 402 U.S. 673, held that the scope of the consent order must be discerned within its "four corners" (*id.* at 682), and that the order must be construed "as it is written" (*ibid.*). Under this standard, the court of appeals reasoned, the order must be construed as prohibiting only the "act" of acquisition, and not the continued retention of assets acquired contrary to its terms (Pet. App. 8A–9A). The court thus adopted respondent's contention that since the order proscribes only the acquisition of specified assets but not the "holding" of such assets, it is not a violation of the order for respondent to retain the assets it had unlawfully acquired (see Pet. App. 8A).

---

[9] The court of appeals had previously denied respondent's motion to dismiss the appeal on the ground that under the Expediting Act, 15 U.S.C. 29, the appeal lay only to this Court. 462 F. 2d 1104.

ARGUMENT

UNDER THE PENALTY PROVISIONS OF SECTION 5(*l*) OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 11 (*l*) OF THE CLAYTON ACT, THE RETENTION OF PROPERTY ACQUIRED IN VIOLATION OF A FEDERAL TRADE COMMISSION ORDER PROHIBITING SUCH ACQUISITION IS A CONTINUING OFFENSE SUBJECT TO A SEPARATE PENALTY FOR EACH DAY THE ILLEGALLY-ACQUIRED PROPERTY IS RETAINED

A. INTRODUCTION AND SUMMARY OF ARGUMENT

Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), and Section 11(*l*) of the Clayton Act, 15 U.S.C. 21(*l*), provide in relevant part that any person who violates a final order of the Commission shall be liable for civil penalties of not more than $5,000 for each violation (now $10,000 if the proceeding is brought under Section 5(*l*)). Sections 5(*l*) and 11(*l*) also provide that "[e]ach separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense." The issue presented by this case is whether the retention of property acquired in violation of a Commission order prohibiting such acquisitions is a continuing offense subject to a separate penalty for each day the illegally-acquired assets are retained.

In recent years the Federal Trade Commission has included in its orders in appropriate cases provisions barring further acquisitions (usually for a limited

period) without prior Commission approval.[10] Such remedial provisions have two broad purposes, both of which supplement the Commission's authority to enforce the antitrust laws. First, they permit the Commission to withhold approval of particular acquisitions inconsistent with the remedial objectives of the order, even though, if viewed separately, the acquisitions might not themselves violate the antitrust laws.[11] Second, they eliminate the problems that inhere in divestiture proceedings by affording the Commission an opportunity to assess the competitive effects of a proposed acquisition before it is consummated. The validity of such future non-acquisition provisions is now established. *Abex Corporation* v. *Federal Trade Commission*, 420 F. 2d 928, 933 (C.A. 6), certiorari denied, 400 U.S. 865; *Seeburg Corporation* v. *Federal Trade Commission*, 425 F. 2d 124, 129 (C.A. 6), certiorari denied, 400 U.S. 866; cf. *Ekco Products Company* v. *Federal Trade Commission*, 347 F. 2d 745, 753 (C.A. 7).

---

[10] The non-acquisition orders in force as of February 1, 1974 are listed at Pet. App. 18A–22A.

[11] As their terms make plain, the Commission's non-acquisition orders do not prohibit absolutely all acquisitions by the firms subject to them. Thus, in *In the Matter of Beatrice Foods Co.*, 67 F.T.C. 473, 731, n. 48, the Commission explained that:

> * * * an order forbidding future acquisitions without prior approval by the Commission is in no sense an absolute ban on such acquisitions. In deciding whether or not to approve a proposed acquisition submitted under such an order, the Commission is not free to act capriciously or unreasonably. It may deny approval only where the acquisition, if consummated, would conflict with the remedial objectives of the order.

There are currently in force 67 of these non-acquisition orders (see Pet. App. 18A–22A[12]). Whether entered after litigation or upon consent, these orders, like Section 7 of the Clayton Act itself, prohibit acquisitions but do not expressly bar the "holding" of stock or assets after they are acquired.

The question presented in this case is of basic importance to the enforcement of these non-acquisition orders. As the Court of Appeals for the Eight Circuit recently stated in *United States* v. *Beatrice Foods Co.,* 493 F.2d 1259, petition for certiorari pending, No. 73–1798,[13] the Tenth Circuit's construction of the typical non-acquisition order "ignores the crucial *effects* of an acquisition and would render non-acquisition orders virtually meaningless" (Supp. Mem. 22, footnote omitted, emphasis added).

If Commission non-acquisition orders are to achieve their basic purpose—to require the firms subject to

---

[12] The list of non-acquisition orders appearing at Pet. App. 18A–22A identifies such orders as of February 1, 1974. Since that date two orders have expired: the order against the Borden Company in Docket No. 6652 (Pet. App. 18A), and the order against Broadway-Hale Stores, Inc. in Docket No. C–1057 (Pet. App. 19A). In addition, one litigated non-acquisition order (Kennecott Copper Corp., Docket No. 8765, which will expire in 1984), and two consent non-acquisition orders (Pepsi Co., Inc., Docket No. 8903 and St. Joe Minerals Corp., Docket No. 8892, which will expire in 1984 and 1977, respectively) have since become final.

As of May 20, 1974, fifty-four of these are consent orders of which 28 have at least five more years to run.

[13] The Eighth Circuit's opinion is reproduced as an appendix to the government's Supplemental Memorandum ("Supp. Mem.") filed in this Court on March 21, 1974.

them to obtain the Commission's approval for acquisitions prior to consummation—there must be an effective incentive for compliance with them. Congress has provided that incentive in the form of civil penalties for violation of Commission orders. The purpose of these sanctions is to deter disobedience of the Commission's orders by making non-compliance costly. By effectively eliminating the threat that violations of non-acquisition orders may result in substantial civil penalties, the Tenth Circuit's ruling removes the most effective incentive for compliance; it converts the prohibition against further acquisitions into a minor additional cost, thus defeating the deterrent purpose of the daily penalties prescribed by Congress.

Under the decision of the court of appeals, the major sanction now available to the courts to deal with properties illegally acquired in violation of Commission orders is merely to require divestiture. That remedy, however, which comes after the illegal transaction has been consummated, is fraught with difficulties, delays, economic costs to the public, and sometimes is rendered wholly impractical by subsequent events.[14] The threat of a $10,000 penalty and a possible divestiture is unlikely to have any significant effect as a deterrent of illegal acquisitions. It is not what Congress intended to accomplish when it provided for penalties [of up to $10,000 a day] for each day of a

[14] See, *United States* v. *First City National Bank of Houston*, 386 U.S. 361, 370–371; *Utah Public Service Commission* v. *El Paso Natural Gas Co.*, 395 U.S. 464.

continuing offense.[15] The effect of the ruling below is to encourage a firm contemplating an acquisition that may violate a non-acquisition order to make the acquisition and take its chances, instead of complying with the order by first seeking Commission approval.[16]

Our submission that the retention of illegally acquired assets constitutes a continuing violation giving rise to daily penalties is consistent not only with the purpose of the civil penalty statutes but also with established principles under Section 7 of the Clayton Act, which the Commission order in this case was designed to implement. In *United States* v. *du Pont,* 353 U.S. 586, this Court held that the purpose of Section 7 was to arrest the effects of an illegal acquisition (353 U.S. at 596–597). In so holding, the Court rejected the contention of the dissenting opinion that the violation was complete when the act of acquisition occurred (*id.* at 620). Commission orders prohibiting acquisitions without the prior approval of the Commission are, like Section 7, intended to prevent the effects of an illegal

---

[15] The amount of the penalties to be imposed is within the discretion of the district court, but may not exceed the statutory maximum. As the district court observed in the *Beatrice Foods* case: "Penalties could range * * * from $5,000 [now $10,000] a day down to zero or $1.00 a day." 322 F. Supp. 139, 141 (D. Minn.).

[16] Compliance in the context of these orders simply means seeking the Commission's prior approval for a proposed acquisition (see *supra*, n. 11). In addition, the Commission's rules provide that, upon request, the Commission will advise a party whether a proposed course of action would comply with an order. 16 C.F.R. 3.61(d).

acquisition and retention of illegally acquired assets therefore constitutes a continuing violation of such an order.

This Court's decision in *United States* v. *Armour & Co.*, 402 U.S. 673, is not controlling in this case. In *Armour*, this Court held that the government's contention as to the purpose of the consent decree there involved was not supported by analysis of its provisions. Thus, the Court held, the decree did not bar the acquisition by a non-party of a controlling interest in a party, because the terms of the decree did not prohibit the relationship. There is nothing contained in the Commission order in this case which suggests that the prohibition on acquisitions is limited to the act of acquisition.

Finally, respondent has indicated in the opposition to our petition for a writ of certiorari that it will seek to present certain issues for resolution by this Court. As we discuss more fully at pp. 25–27, *infra*, these issues are not properly before the Court.

B. A COMMISSION ORDER PROHIBITING FUTURE ACQUISITIONS BARS NOT MERELY THE ACQUISITION BUT ALSO THE RETENTION OF THE ILLEGALLY-ACQUIRED PROPERTY.

In Section 7 of the Clayton Act, Congress prohibited acquisitions whose "effect * * * may be substantially to lessen competition." There is nothing intrinsically anticompetitive about an acquisition itself. The evil Congress sought to prevent was the

probable anticompetitive effect of certain acquistions, and the remedy Congress selected to accomplish that objective was to prohibit them.

An acquisition is likely to have anticompetitive effects where, as a result of acquiring control of another firm or its assets, the acquiring firm is in a position that may adversely affect the competitive structure of the industry. In Section 7, Congress sought to bar in their incipiency the injuries to competition that are likely to result from such changes in market structure.[17]

The obvious purpose of an order barring future acquisitions is to prevent the anticompetitive effect which such acquisitions are likely to cause. The mere acquisition itself cannot produce anticompetitive effects; they result from the change in market structure that the continued retention of the acquired firm or its assets produces. Accordingly, if the Commission order prohibiting future acquisitions is to perform a meaningful function in effectuating the purposes of Section 7, it must be construed to prohibit not just the acquisition but also the retention of the illegally acquired property, since it is that retention that gives rise to whatever anticompetitive effect the acquisition may have.

Thus, by retaining the assets which the Commission order prohibited it from acquiring, respondent committed a "failure to obey" the order barring the

---

[17] See *e.g.*, *United States* v. *du Pont & Co.*, 353 U.S. 586, 589; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362.

acquisition, within the meaning of the penalty provisions of the statute.

Indeed, Continental itself recognized that this was the intention of the order when it agreed to settle the litigation through entry of the consent order. The parties stated that "[o]ne of the principal problems in the baking industry is the tendency towards concentration and the continuous growth of major baking companies through acquisition," that this "places in the hands of a few large companies the means to set the pattern of competition, not only among themselves, but also for all local baking companies serving any given area," and that under the consent order Continental's "alleged continuous practice of acquiring companies baking and selling bread * * * will be brought to a halt" (App. 84). The agreed purpose of the order—halting Continental's role in the industry's "tendency towards concentration and the continuous growth of major baking companies through acquisition"—would be wholly defeated if the order prohibited only the acquisition but not the retention of the specified firms or their assets.

This Court has recognized that the prohibitions of Section 7 are directed against the effects of an acquisition and not just the acquisition itself. In *United States v. du Pont & Co.*, 353 U.S. 586, the Court held that the legality of du Pont's acquisition of General Motors' stock should be determined by assessing its effects at the time the government brought suit (1949) rather than at the time of acquisition (1917–1919). In so holding, the Court expressly rejected the argument

that "the Government could not maintain this action in 1949 because § 7 is applicable only to the acquisition of stock and not to the holding or subsequent use of the stock" (353 U.S. at 596–597). It explained that the argument was misconceived because the aim of Section 7 "was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition * * *" (*id.* at 597).

The Court so ruled over a strong dissent which argued that the majority had amended Section 7 to extend it to prohibit the continued holding of stock whenever the effect of such continued holding may be substantially to lessen competition. "But," the dissent asserted, "the fact of continued holding does not allow the Government to dispense with the necessity of proving that the stock was unlawfully acquired. The offense described by § 7 is the acquisition, not the holding or the use, of stock. When the acquisition has been made, the offense, if any, is complete" (*id.* at 620). The dissent's limited construction of Section 7, which the Court rejected, parallels the district court's construction of the order in this case ("[o]nce these two acquisitions were accomplished, the violations were complete"), which the Tenth Circuit approved (Pet. App. 8A–9A).

The Second Circuit has also recognized that Section 7 is directed against the anticompetitive relationships resulting from an acquisition and not just the acquisition itself. *Gottesman* v. *General Motors Corp.*, 414 F. 2d 956. That case was a private treble damage

action based in part on du Pont's acquisition of General Motors' stock which this Court, in *United States v. du Pont & Co., supra,* held violated Section 7 of the Clayton Act. In ruling that the district court had given insufficient weight to the judgment entered in the government's litigation against du Pont, the court stated (414 F. 2d at 965): "[T]he very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 continued through 1961. We need not dispute the statement of the district court that, in the ordinary antitrust case, there is no 'presumption of continuance of unlawful conduct' * * *. Here, however, what was unlawful was du Pont's status as stockholder in General Motors, and that status continued until divestiture."

The same reasoning, we submit, requires that the Commission's order prohibiting future acquisitions be construed to cover not just the acquisition but also the retention of the illegally acquired assets. Like Section 7 itself, the Commission's order was designed "primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition * * *" (*du Pont, supra,* 353 U.S. at 597). The Commission's order, no less than the underlying statute it implements, should be interpreted in a way that accomplishes rather than defeats its purpose. That objective can be accomplished only if the order is given the common sense interpretation of prohibiting the continued retention of assets that have been illegally acquired in violation of the order.

ITT Continental has pointed out (Br. in Opp. 9) that some judicial consent decrees enjoin both the acquisition and holding of specified stock or assets. We submit, however, that these judicial decrees do not aid respondent because, in the context of a court decree, this additional ban on "holding" adds nothing to the injunction against "acquiring." The making of a prohibited acquisition would be a contempt of court, and the court could assess whatever penalties it deemed appropriate, without regard to whether the decree expressly enjoined "holding" unlawfully acquired properties. Moreover, the contempt would continue for as long as the defendant held such properties. This is precisely the teaching of the Second Circuit's decision in *United States* v. *Schine,* 260 F. 2d 552, certiorari denied, 358 U.S. 934.[18]

In the penalty provisions of the Clayton and Federal Trade Commission Acts, Congress has adopted the same philosophy by providing that each day of continuing failure to obey a Commission order is a separate offense.

[18] In *Schine*, respondents in a contempt proceeding had been found by the district court to have violated several injunctive provisions of an antitrust decree by, among other things, acquiring interests in theaters without court approval. One of the grounds upon which the respondents attacked the findings of violations was that the activities all occurred prior to the period of the statute of limitations. The Second Circuit rejected this contention (260 F. 2d at 555–556): "[A]lthough the initial acts in contempt of the decree occurred prior to the statutory period, the 'illegal' conditions which they created continued up to the date of the order to show cause and resulted in what might be called 'continuing contempts.' Here * * * it is the maintenance of conditions in violation of the decree which is the charge against the respondents."

C. THE LEGISLATIVE HISTORY OF THE PENALTY PROVISIONS CONFIRMS THAT EACH DAY OF RETENTION OF ASSETS ACQUIRED IN VIOLATION OF A COMMISSION ORDER IS A SEPARATE OFFENSE.

The civil penalty provisions involved in this case first appeared in the Wheeler-Lea Act of 1938 (52 Stat. 111), which generally amended the review and enforcement procedures of the Federal Trade Commission Act. That Act substituted for the previously existing provisions for court review and enforcement of Commission orders the provision that, after a Commission order had become final as provided in the statute, a violation of such order subjected the respondent to a civil penalty of not more than $5,000. The stated purpose of the penalty provision was to "enforce obedience to the Commission's orders to cease and desist * * *." H. Rep. No. 1613, 75th Cong., 1st Sess., p. 4. By the Clayton Finality Act of 1959 (73 Stat. 243), the penalty provision was made applicable to Commission orders under the Clayton Act. See *Federal Trade Commission* v. *Jantzen, Inc.*, 386 U.S. 228.

Initially, the penalty sections of both Acts did not contain the present continuing-offense provisions. Those were added to the Federal Trade Commission Act in 1950, and to the Clayton Act in 1959. When Congress was considering the addition of the continuing penalty provision to the Federal Trade Commission Act in 1950, the Commission's staff advised Congress by letter that the proposed amendment "simply provides that in those infrequent cases where the violation is a single act or course of conduct continuing over a period of time the government is not limited to a maximum penalty of $5,000, and may seek

a daily penalty" (letter to Sen. Fulbright from W. T. Kelley, General Counsel, Federal Trade Commission, dated March 7, 1950, 96 Cong. Rec. 2974). The letter cited two situations in which the continuing penalty provisions were believed necessary, neither of which is here applicable: (1) violations of an order against false advertising where the false advertisement is placed on a billboard; and (2) violations of an order against conspiracies in restraint of trade. *Ibid.*; see also 96 Cong. Rec. 2981.

When Congress in 1959 extended the civil penalty provisions to the Clayton Act, these same two situations were brought to its attention. Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary on the Finality of Clayton Act Orders, 86th Cong., 1st Sess., p. 21. More significantly for this case, however, the House Committee Report on that bill stated that "unless the maximum penalty applied and each day of a continuing violation considered [sic] a separate offense, an order dissolving an unlawful merger could be ignored after the mere payment of a $5,000 fine." H. Rep. No. 580, 86th Cong., 1st Sess., p. 7.

Congress did not otherwise focus upon the issue in this case, whether the continuing penalty provision applies to the retention of assets acquired in violation of a Commission order. If, however, as the legislative history shows, Congress intended that failure to obey a Commission order dissolving an unlawful merger was a continuing offense, *a fortiori* it would be a continuing offense to retain assets that had been acquired in violation of an outstanding order prohibiting their

acquisition. In each instance, the substantial penalties that can be imposed only if each day of the retention of the illegally held assets is viewed as a separate offense are necessary if compliance with Commission orders is to be assured.

D. *UNITED STATES V. ARMOUR & CO* 402 U.S. 673, DOES NOT ESTABLISH THAT THE NON-ACQUISITION CONSENT ORDER PROHIBITS ONLY THE ACQUISITION, BUT NOT THE RETENTION OF THE ILLEGALLY-ACQUIRED ASSETS.

The court of appeals concluded that *United States* v. *Armour & Co.*, 402 U.S. 673, required that the consent order be construed as prohibiting only acquisitions, but not retention of the illegally acquired assets. It stressed (Pet. App. 3A, 9A) the language in that opinion that "the scope of a consent decree must be discerned within its four corners" and that the decree "must be construed as it is written * * *" (402 U.S. at 682). Since the order in this case prohibited only the acquisition but not "the acquisition and retention" of assets, the court of appeals read it as "not extend[ing] to the holding of assets acquired contrary to the order" (Pet. App. 9A).

The court's reliance on *Armour* was misplaced and that decision does not support its unrealistic interpretation of the Commission's order.

In *Armour,* the government contended that Greyhound's acquisition of Armour violated the Meat Packers Consent Decree of 1920. That decree enjoined the defendants, including *Armour,* from engaging in certain lines of business, including specified food products, and from owning any interests in businesses

which dealt in those products (402 U.S. at 676). The government's claim was that, since the decree would have barred Armour from acquiring Greyhound, because the latter was engaged in the retail food business, it also barred Greyhound from acquiring Armour on the theory that that acquisition would circumvent "the decree's purported purpose of separating the meatpackers from the retail food business" (*id.* at 677).

The Court rejected that claim, ruling that the decree "does not effect a complete separation, but, rather, prohibits particular actions and relationships not including the one here in question. * * * [T]he decree does not speak in terms of relationships in general, but rather prohibits certain behavior, and in doing so prohibits some but not all economic interrelationship between Armour and the retail food business" (402 U.S. at 677–678). The decree contained "* * * no prohibition against selling any interest to a grocery firm * * *" (*id.* at 679). It was in the light of that interpretation of the decree that the Court used the language upon which the court of appeals relied, in rejecting the government's argument that Greyhound's acquisition of Armour would frustrate the purposes of the decree (*id.* at 680–681).

There is nothing in the Commission's consent order to show that it was intended to bar only the acquisition and not the retention of illegally-acquired assets. The government is not attempting to extend the order to a situation it does not cover, but only to give the language its

natural and intended meaning. *Armour* would be pertinent if the government were contending that the order bars another firm from acquiring Continental. But it does not shed any light on, let alone determine, the question of what constitutes "failure to obey" an order prohibiting acquisitions without prior Commission approval.

E. ITT CONTINENTAL'S OTHER CONTENTIONS ARE NOT PROPERLY BEFORE THE COURT AND IT SHOULD NOT CONSIDER THEM

Respondent urged (Br. in Opp. 2, 13–14) that if the Court granted the petition, it also would have to decide (1) whether the agreements between Continental and the three local bakeries constituted acquisitions prohibited by the order, (2) whether ITT Continental is a "successor" to Continental and assumed its liabilities under the order, and (3) whether daily penalties may be assessed for the period after the Commission learns that its order is being violated but does not provide notice to the party that it is violating the order.

With respect to the first two contentions, they are not properly before this Court because respondent did not file a cross-petition for a writ of certiorari to review them. See *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381, n. 4. These arguments cannot be urged as alternative grounds for affirmance of the court of appeals' judgment, since their acceptance would result not in affirmance but in substantial modification of that judgment.

The court of appeals' judgment affirmed the district court's judgment that Continental's arrangements with two of the three local bakeries were acquisitions prohibited by the order, and it reversed the district court's judgment that the arrangement with the third local bakery was not. If ITT Continental's contention that the arrangements with the three local bakeries were not acquisitions prohibited by the the order were to prevail, that would require a reversal, not an affirmance, of the court of appeals' judgment.

Similarly, if ITT Continental's contention that it is not a successor to Continental were to prevail, that would not result in affirmance of the court of appeals' judgment. If ITT Continental is not a successor of Continental, then, theoretically at least, no penalties should have been assessed against it. However, as reflected in both the district court's findings and conclusions (Pet. App. 16A) and the court of appeals' opinion (Pet. App. 7A–8A), ITT Continental conceded its liability for violations of the order incurred by Continental prior to the date of its merger with ITT Continental. Thus, acceptance of ITT Continental's contention that it is not subject to penalties because it is not a successor of Continental would result in a reversal of the court of appeals' judgment that ITT Continental is liable for single civil penalties for each of the prohibited acquisitions; or, if ITT Continental's concession of liability for penalties that Continental may have incurred is controlling, accept-

ance of its successorship contention would result in a ruling terminating its liability, if the violations are held to be continuing, as of the date it merged with Continental. An affirmance of the court of appeals' judgment would not result in either situation.

Whether daily penalties may be assessed for the period after the Commission became aware of the violations, but prior to giving Continental notice thereof, was not decided either by the district court or the court of appeals because of their conclusion that daily penalties are not assessable. This Court need not consider that question. If the Court agrees with us that daily penalties are assessable, the duration of such penalties and their amount is a matter for the district court to determine in the first instance based upon the record before it.

Accordingly, there is no occasion for this Court in this case to reach the three additional questions which respondent poses. If this Court agrees that the violations here are continuing and remands for the imposition of daily penalties, it would not be open to ITT Continental to relitigate the question whether it is bound by the order. The district court held that it is bound by the order, the court of appeals' judgment affirmed that ruling (although its opinion did not specifically address that issue), and ITT Continental did not seek further review of that judgment in this Court by filing a petition or cross-petition for a writ of certiorari.

CONCLUSION

The part of the court of appeals' judgment which affirmed the district court's ruling that the prohibited acquisitions constituted single violations of the order should be reversed, and the case should be remanded to the district court to consider the imposition of appropriate daily civil penalties for the violations.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
THOMAS E. KAUPER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
GEORGE EDELSTEIN,
Attorneys.

JUNE 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

No. 73-1290

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, *Petitioner*,

v.

ITT CONTINENTAL BAKING COMPANY, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE RESPONDENT

JOHN H. SCHAFER
MICHAEL BOUDIN
DAVID J. CYNAMON

888 Sixteenth Street, N. W.
Washington, D. C. 20006

Attorneys for Respondent ITT Continental Baking Company, Inc.

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

August 1974

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1290

UNITED STATES OF AMERICA, *Petitioner,*

v.

ITT CONTINENTAL BAKING COMPANY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Whether under a negotiated Federal Trade Commission consent order which requires a firm to cease from "acquiring" assets of other firms in the same industry, but which does not bar "holding" such assets, the Government may collect under the Clayton and Federal Trade Commission Acts not only initial single penalties for allegedly forbidden acquisitions but also continuing daily penalties for the holding of such assets?

2. Whether a negotiated FTC consent order which bars a firm only from "acquiring, directly or indirectly . . . the whole or any part of the . . . assets of any concern . . . engaged in the production and sale of bread" is violated by a firm which enters into a contract to supply bread to a producer and seller of bread who unilaterally decides to terminate production of bread and remain in business as an independent distributor?

3. Whether a negotiated FTC consent order which does not by its terms apply to "successors" may nevertheless be applied to an unrelated successor firm, where that firm acquires the firm subject to the order pursuant to an arms-length transaction causing substantial changes in owership and control, and where such acquisition is entered into without any purpose to evade the obligations under the order?

4. Whether the FTC may collect accumulating daily penalties for periods long after it has completed its investigation and concluded that there is a continuing violation of its consent order, when it has failed to inform the alleged violator of its jeopardy and mounting potential liability?

STATEMENT OF THE CASE

A. Background to the Court Proceedings

The consent order at issue in this case was the result of a complaint brought in 1960 by the Federal Trade Commission, pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, against Continental Baking Company ("Continental"). The complaint sought divestiture of certain companies acquired by

Continental, as well as other relief (App. 61-71).[1] Prior to any decision in the case, Continental and FTC complaint counsel agreed to a proposed consent order (App. 72-76). Continental agreed to a divestiture of certain assets and a ten-year prohibition on "acquiring, directly or indirectly, . . . the whole or any part of the stock, share capital, or assets of any concern . . . engaged . . . in the production and sale of bread and bread-type rolls" unless it obtained the prior approval of the Commission (App. 74).

The proposed order was "negotiated" by the parties (App. 31). It did not constitute an admission by Continental that any of its prior acquisitions were unlawful (App. 73). Nowhere did the proposed order purport to prohibit the holding, as opposed to the acquisition, of such stock or assets; the order did not purport to prohibit Continental from establishing distributorship arrangements with other bread companies; nor did the order purport to prohibit the acquisition of firms engaged only in sale, or only in production, of bread products.

The agreement containing the proposed consent order was followed by an "Appendix" which, in an effort to persuade the Commission to adopt the proposed consent order, set forth at length the background relating to the initial complaint and the proposed order (App. 77-84). As the wording of the document made clear, it did not purport to alter or to construe the terms of the consent order. Rather, its sole and stated purpose was to persuade the Commission "that this

---

[1] "App." refers to the appendix filed in this Court. "Pet. App." refers to the appendix to the Government's certiorari petition, containing the decisions of the lower courts in this case.

consent order is in the public interest and should be issued by the Commission" (App. 84).

The hearing examiner recommended that the Commission approve the agreement and adopt the consent order (App. 85-89). *Continental Baking Company,* 60 F.T.C. 1183, 1191 (1962). On May 11, 1962, the Commission adopted the proposed order without change (App. 32). *Id.* at 1194.[2] The Commission, however, did not formally adopt the Appendix to the agreement and it is not reprinted with the order in the Commission's official report.

In 1965 Continental, without prior Commission approval, entered into a distributorship agreement with the Mack Baking Company ("Mack") of Bangor, Maine, an independent producer and seller of bread products, by which Mack became a distributor of Continental bread products (App. 132-34). Such distributorship arrangements permit a small baking company to provide products to its own customers on its own routes, while affording it the advantage of an assured supply and potential cost savings of high-volume production.[3] The Commission has never

---

[2] The ten year ban on acquisitions expired on May 11, 1972, and the consent order accordingly is without present force or effect. The Commission has, however, under consideration an order to show cause why the ban on acquisitions should not be extended an additional period of years. *Continental Baking Company* (FTC Dkt. 7880).

[3] During the 1960's "skyrocketing" costs and other changes in the industry had produced a larger number of bakers and greater capacity than demand could absorb. FTC, *Economic Report on the Baking Industry* 4-7, 44-48 (1967). Although a small bakery company might be severely handicapped by low volume if it produced its own goods, its size would not necessarily be a sig-

challenged this agreement nor suggested that it was in any way a violation of the consent order (App. 52).

Thereafter, in 1965 and 1966 Continental entered into distributorship agreements with three small western baking companies, Bon Ton, Inc. ("Bon Ton"), Wyoming Baking Company ("Wyoming"), and Sheppard Baking Company ("Sheppard") (App. 94-99, 107-13, 117-21). The owners of each of these companies decided, on economic and personal grounds (App. 35-36, 40, 50), to terminate bread production but to remain in the bread business as distributors.[4] The agreements provided that Continental would supply bread products to the three companies for resale on their own routes and to their own customers (App. 36, 43, 50). None of the companies was competing with Continental when the agreements were made. The result of the agreements was that none of the three bakers was eliminated from the market, as each might have been without Continental's supply contracts. Each company maintained its own routes, its own customers, and full control over sales and employment policies (App. 38, 44, 51).

In 1966 and 1967 new circumstances affecting the owners of Bon Ton and Wyoming respectively led them to terminate their distributorship agreements with Con-

---

nificant disadvantage on the distribution side of the business so long as its individual routes represented sufficient volume to occupy its trucks and drivers.

[4] Thus, for example, the proprietor of Bon Ton was "in his early sixties, had had serious medical problems in 1962 and 1963, and his family was urging him to get out of the bakery business. [He] faced a shortage of competent personnel, particularly in a supervisory capacity, and Bon Ton had sustained its first operating loss in 1964" (App. 35-36).

tinental (App. 39, 47-49),[5] and ultimately the distributorships were bought by Continental itself.[6] At the time of the sales, neither firm was engaged in the "production and sale" of bread products (App. 39, 49). Sheppard continues to operate as an independent dealership, but it terminated its supply agreement with Continental on May 12, 1973, and has since been supplied by a competitor of Continental.

In an arms-length merger on September 13, 1968, Continental's business operations and assets were taken over by a wholly-owned subsidiary of International Telephone and Telegraph Corporation ("ITT"), called ITT Continental Baking Company ("ITT Continental") (App. 32-33). It is stipulated that this merger was in no way entered into for the purpose of evading the obligations of the consent order (App. 33), and the transaction resulted in a complete change in ownership and control of Continental (App. 33-34). See pp. 50-1, below.

---

[5] In early 1966 Bon Ton found itself confronted with a prospective competitive disadvantage with respect to its principal competitor; and in March 1966 Bon Ton's proprietor was hospitalized with a possible second heart attack and his family insisted that he get out of the distributorship (App. 38-39). The dissolution of the Wyoming distributorship developed from a dispute between the proprietor and Continental over the terms of the agreement, loan arrangements, and credit terms (App. 46-47).

[6] The Bon Ton distributorship was purchased directly from the proprietor at his urging (App. 39). In the case of Wyoming, Continental prevailed upon an existing distributor operating in another section of the country to take over the Wyoming distributorship, but the arrangement was not a financial success and Continental eventually purchased the Wyoming distributorship from its new owner (App. 49).

B. The Court Proceedings

Beginning in May 1966 the Commission undertook a fact-finding investigation of the Mack, Bon Ton, Wyoming, and Sheppard transactions (App. 51-52). Continental supplied the Commission with information respecting the distributorships, and investigational hearings were conducted and completed prior to June 1967 (App. 52).[7] Nevertheless, over a full year elapsed before the Commission without notice to Continental certified the facts, accompanied by a draft complaint, to the Attorney General (App. 52-53). At no point during this period was Continental advised that the Commission regarded any of the distributorship agreements as a forbidden "acquisition" or that it considered such an acquisition to make the company liable for ever increasing *daily* penalties (App. 52).

The first notice Continental had of the Government's position was the commencement of the present action in December 1968 in which the Government asserted that the Bon Ton, Wyoming and Sheppard transactions —but not the Mack transaction—were "acquisitions" forbidden by the consent order (App. 52).[8] Despite the Commission's failure to inform Continental of its jeopardy, the Government in the present suit demanded *daily* penalites of $1.000 from the date of Continental's agreement with each company to the date of the filing

[7] The two investigational hearings occurred in May 1967 (App. 52) and the final request for information to Continental was received on May 12, 1967 (App. 52). There is no evidence that any subsequent fact-finding inquiry was conducted by the Commission into the relevant transactions.

[8] The suit was brought against ITT Continental. Continental had ceased to exist earlier in the year as a result of its merger into ITT Continental.

of the complaint (App. 19). Under the governing statutes, normally only one penalty of up to $10,000 can be assessed "for each violation" of a cease and desist order, but the provisions also permit daily penalties for a "continuing failure or neglect to obey" a final order.[9] As discussed more fully below, the Government here sought to justify daily penalties—totaling over $3 million—on the ground that the cease and desist order should be read to prohibit the "holding" as well as the "acquiring" of the proscribed assets.[10]

On the basis of the stipulation of facts filed by the parties (App. 29-60), the District Court found that the consent order could be "reasonably read" to permit the three challenged transactions, but that the Bon Ton and Wyoming agreements constituted "acquisitions" in violation of the order (Pet. App. 14A). The apparent basis for this finding was the court's view that Continental ultimately acquired "assets" of these two companies—in particular their "sales, sales routes and sales volume"—when the distributorships were taken over by it (Pet. App. 14A). The Sheppard transaction was distinguished since, among other differences, Con-

---

[9] The parallel penalty sections of the Clayton and Federal Trade Commission Acts provide that violation of an FTC order gives rise to a civil penalty "of not more than $10,000 for each violation." Section 11(*l*), 15 U.S.C. § 21(*l*); Section 5(*l*), 15 U.S.C. § 45(*l*). Each section also provides that each separate violation is a separate offense "except that in the case of a violation through *continuing failure or neglect* to obey a final order . . . each day of continuance of such failure or neglect shall be deemed a separate offense." Id. (emphasis supplied). (The maximum penalty under Section 5(*l*) was $5,000 at the time of trial in this case and was subsequently raised to $10,000. 87 Stat. 591).

[10] The Government later also requested that the court order the divestiture of the three companies allegedly "acquired" by Continental (App. 27).

tinental did not acquire its route or customer lists. In drawing this distinction, the District Court necessarily rejected the Government's view that the distributorship agreements standing along comprised forbidden acquisitions.

Turning to the issue of penalties for the Bon Ton and Wyoming transactions, the District Court found "that the terms of the consent order proscribe only the act of acquisition and that the violations of the consent order . . . did not constitute a 'continuing failure or neglect to obey' said order. Accordingly the government's demand for imposition of daily penalties . . . is denied. Once these two acquisitions were accomplished, the violations were complete" (Pet. App. 15A). Therefore, the court imposed on Continental single statutory penalties of $5,000 each for the Bon Ton and Wyoming "acquisitions" (Pet. App. 16A). The court also issued an injunction tracking the language of the consent order, but refused to order divestiture (Pet. App. 15A-16A).

With respect to Continental's contention that the Commission had unduly delayed in notifying Continental of its jeopardy, the court found it unnecessary to decide the issue in view of its holding that daily penalties could not be assessed under the consent order as written. The court stated, however, that "it would seem unreasonable to permit the commission to knowingly let daily penalties accrue without giving notice of the commission's position at the earliest reasonable time" (Pet. App. 15A).[11]

---

[11] The court also stated that ITT Continental was a successor of Continental and that ITT Continental "assumed the liabilities of Continental Baking Company including the liabilities under

On appeal by both parties, the Tenth Circuit reversed the District Court as to the Sheppard transaction, but otherwise affirmed (Pet. App. 9A-10A). In substance, the Court of Appeals—in disagreement with the District Court—seemingly held that the distributorship agreements themselves constituted acquisitions whereby Continental "acquired" the "market and volume" of the bakeries in question (Pet. App. 7A).[12] Accordingly, the court remanded the case to fix a penalty for the Sheppard transaction in addition to the penalty already fixed for the other two transactions.

In affirming the District Court's ruling against the imposition of daily penalties, the Court of Appeals expressly relied upon *United States* v. *Armour & Company,* 402 U.S. 673 (1971), and *Hughes* v. *United States,* 342 U.S. 353 (1952), which held that in the interpretation of a consent order the scope of such an order " 'must be discerned within its four corners, and not by reference to what might satisfy the purposes of one

---

the Federal Trade Commission consent order" (Pet. App. 16A). ITT Continental had admitted its liability for monetary penalties resulting from any violations of the consent order by Continental prior to the time Continental ceased to exist through its merger into ITT Continental. Although ITT Continental denied that it could be charged with penalties continuing after the date of the merger, the District Court had held that no daily penalties could be assessed under the consent order in any event, so the issue of post-merger penalties did not arise.

[12] Although this is what the Court of Appeals appears to say, the reasoning is not entirely clear from the opinion. It is plain that, under the terms of the consent order, Continental was prohibited from acquiring "stock" or "assets" of bakeries described by the order but it was not prohibited from serving the same market or the same customers.

of the parties to it' " (Pet. App. 3A). Accordingly, the court held that:

> "To consider the consent order 'within its four corners,' the wording is directed to the acquisition of businesses engaged in bread making, directly or indirectly. The only reference in the order is to the 'acquiring' of such businesses. . . .
>
> This consideration of the order leads us to agree with the trial court as to whether the violations found were continuing or not . . ." (Pet. App. 4A).

ARGUMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents at the outset a single, narrowly focused question turning upon the construction of particular language used in a consent decree entered into between the FTC and Continental. The Government claims that under a consent order which prohibits only "acquiring" assets, ITT Continental is subject to daily penalties—as distinct from single penalties—for its continued "holding" of assets acquired in alleged violation of the order. Both courts below held, contrary to the Government's position, that a consent order which prohibits "acquiring" assets means just what it says, and cannot be modified under the guise of interpretation to extend to the "holding" of acquired assets.

The lower courts' conclusion accords with, and is directly supported by, this Court's recent decision in *United States* v. *Armour & Co.,* 402 U.S. 673 (1971), and the settled line of authority that it represents. *Armour* was the culmination of a series of Supreme Court cases which have established two requirements in the construction of consent decrees: first, that the explicit

language of a consent decree is the controlling guide to its interpretation; and second, that the language of a decree cannot be changed or distorted by virtue of an alleged "purpose" of the decree or of the underlying regulatory statutes. The Government's argument in the present case is clearly inconsistent with these principles.

In defiance of *Armour,* the Government virtually ignores the actual language of the consent order here involved. Indeed, its brief makes clear that it is urging this Court to construe the order to say that it prohibits the "retaining" or "holding" of assets even though the relevant paragraph of the order manifestly includes no such language. This effort to warp the language, which would be inappropriate even in statutory construction, is indefensible in construing a bargained-for consent agreement designed to compromise litigation.

The Government underscores its departure from *Armour* by permeating its brief with claims that its "interpretation" of the consent order will conform with the "purposes" of Section 7 of the Clayton Act and the order itself. If they do nothing else, *Armour* and its predecessors make one thing unmistakably plain: the "purpose" of the statute is an impermissible standard for interpretation of a consent order; and the consent order itself has no "purpose" other than to settle the case in accordance with its express terms.

Even were it relevant, the "purpose" of Section 7 does not support the result sought here by the Government. The "purpose" of Section 7 is to prohibit anticompetitive *acquisitions,* and neither *United States* v. *DuPont & Co.*, 353 U.S. 586 (1957), nor any other cited authority gives the statute any other reading. The

Government cannot escape the thrust of *Armour,* as it attempts to do, by fastening upon particular factual differences in the order there involved and disregarding the principles of construction which the Court there affirmed. Similarly, the Government's effort to show that the present consent decree does have a "purpose" to prohibit retention of assets must fail because the document relied upon to show such a purpose is a collateral document which in no way indicates an intention of the parties to prohibit the "holding" as well as the "acquiring" of assets.

Equally unpersuasive is the Government's claim that the legislative history of the civil penalty provisions requires that daily penalties be assessed in this case. In the first place, the refusal of the lower courts to grant the Government's demand for daily penalties was based not upon the penalty provisions, but on the plain language of the consent order. In addition, the legislative history of the penalty provisions proves that individual acquisitions were not the sort of inherently continuing failure to obey an agency command which the daily penalty provisions were intended to reach. On the contrary, the examples given in the legislative history shows that discrete transactions (*e.g.,* radio broadcasts in violation of an FTC false advertising order) fall outside the daily penalty provisions.

Finally, there is no basis for believing that parties subject to anti-acquisition orders will feel free to violate those orders unless daily penalties are assessed. The Commission may always demand full injunctive relief, including the drastic penalty of divestiture, for violations of such orders. Furthermore, if the Commission seriously fears disruption of its anti-acquisition orders, it has full statutory power to modify ex-

isting orders to include specific bans against "holding" as well as "acquiring" assets, and it may easily write all new orders to include such a ban.

What will truly disrupt the administration of FTC consent orders is the very approach urged by the Government in this case. By ignoring the plain language of the consent order in a search for a supposed "purpose" of the order or related legislation, the Government would foster needless and time consuming litigation at the expense of the certainty achieved by applying the *Armour* doctrine. And, if respondents know that a "limited" consent order for which they have bargained can later be "interpreted" to include entirely new prohibitions, they will have a strong incentive to litigate the issues in the first instance, with consequent overwhelming costs to the Government in time and resources.

Even if the Court determines that the consent order at issue does prohibit "holding" as well as "acquiring" assets, three additional grounds preclude or limit assessment of daily penalties against ITT Continental. First, the transactions challenged by the Commission are not violations of the consent order at all, since they did not involve forbidden acquisitions but rather involved distributorship agreements, an entirely distinct concept under the antitrust laws. Second, ITT Continental, as a bona fide and previously unrelated successor to Continental, cannot be bound by the terms of an order entered against Continental but not specifically against its "successors." Third, the Commission's unreasonable failure to notify Continental or ITT Continental of the Commission's position long after it had full knowledge of all relevant facts, precludes subsequent daily penalties.

These issues, which are discussed at greater length below, will not be reached if this Court sustains the lower courts' construction of the consent order. If, however, the lower courts' construction is reversed and the Government's position is accepted, then Continental is entitled to defend the refusal to assess daily penalties on any other ground sufficient to sustain it. *E.g., United States* v. *American Railway Express Co.,* 265 U.S. 425 (1924). Each of the three reasons stated would independently justify the refusal of the lower courts to assess daily penalties in this case.[13]

II. WHERE A CONSENT ORDER BY ITS TERMS PROSCRIBES ONLY "ACQUIRING" ASSETS, THE "HOLDING" OF ACQUIRED ASSETS DOES NOT CONSTITUTE A CONTINUING VIOLATION OF THE CONSENT ORDER FOR WHICH DAILY PENALTIES MAY BE RECOVERED.

A. The Armour Decision and Similar Cases Require that the Language of a Consent Order Control Its Interpretation, and the Language of the Consent Order Here Involved Is Inconsistent with the Government's Interpretation.

In the recent case of *United States* v. *Armour & Co.,* 402 U.S. 673 (1971), this Court summarized existing precedent and affirmed the dual principles that govern the interpretation and application of the instant consent order. The first is that the language of the order is the controlling guide to its interpretation; the

[13] While the Government claims that these additional questions are not properly before the Court, it is apparent that all three questions may be determined here. Long-standing precedent and sound policy permit ITT Continental to raise any arguments in defense of the judgment below, even if such arguments are inconsistent with the reasoning of the lower court. Moreover, even if the Government's new standard were accepted by the Court, only the first of the three issues would be foreclosed. As to the second and third, there can be no doubt that they are appropriately raised as affirmative defenses to the Government's claim for daily penalties.

second, discussed more fully below (pp. 21-28, *infra*), is that unlike a statute a consent order cannot be extended by the modification of negotiated language in light of a supposed "purpose" of the order or of the underlying regulatory statutes. In emphasizing the first of these principles, the Court explained:

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. . . . For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. *Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.*" *Id.* at 681-82 (emphasis supplied).

Here, the plain meaning of the order's language confirms that if the supply contracts with Bon Ton, Wyoming, and Sheppard were acquisitions at all, the acquisitions themselves were *single* violations of the order. The consent order itself speaks only of "acquiring" and "acquisition" of stock or assets.[14] The plain

[14] The relevant prohibition in the consent order states that Continental shall cease from "acquiring" specified stock or assets unless the Commission specifically chooses to permit "such an acquisition" in its sole discretion (App. 74). The ordering paragraph in question does not refer either to the holding or the retention of stock or assets.

meaning of those terms—not only in familiar speech, but as used by the courts—is the *act* of obtaining ownership or possession, to "get" or to "gain" as one's own. *See, e.g., Helvering* v. *San Joaquin Co.,* 297 U.S. 496, 499 (1936); *United States* v. *Hibernia Bank Bldg.,* 76 F.Supp. 18, 19 (E.D. La. 1948). Once ownership is obtained, the new owner does not "continue" to acquire the same property; once acquired, it is held or retained. Significantly, the Government pays scant attention to the language of the order, choosing instead —in plain contravention of *Armour*—to dwell upon its alleged "purpose."

The Government's basic position is that Continental violated the order by establishing distributorship arrangements with Bon Ton, Wyoming, and Sheppard, whereby each company distributed Continental products instead of its own. Such arrangements are not in any event "acquisitions" of assets. See p. 41-6 below. But assuming *arguendo* that the "market volume" of each company was an asset indirectly acquired by Continental, then the violation of the order occurred *at the point* the market volume was indirectly acquired.[15] Obviously, Continental could not thereafter "continue" to acquire the same assets it had already acquired. The only way in which a continuing violation could be found would be if, instead of banning only "acquiring" assets, the order specifically prohibited "holding" or "retaining" acquired assets as well.

---

[15] As the District Court properly recognized in this case:

"[T]he terms of the consent order proscribe only the act of acquisition and . . . the violations of the consent order . . . did not constitute a 'continuing failure or neglect to obey' said order. . . . Once these two acquisitions were accomplished, the violations were complete" (Pet. App. 15A).

An examination of the Government brief shows that the Government is attempting to add just such a prohibition to the order. Thus, it states that "[t]he issue presented by this case is whether the *retention* of assets acquired in violation of a Commission order prohibiting such acquisitions is a continuing offense . . ." (Gov. Br. 10) (emphasis supplied) and concludes that "[t]here is nothing in the Commission's consent order to show that it was intended to bar *only the acquisition* and not the *retention* of illegally-acquired assets" (Gov. Br. 24) (emphasis supplied). Certainly there is "nothing" to show such an intent, *except the express language of the order* which plainly prohibits acquisitions and does not even suggest that "retention" of assets is prohibited. One could not imagine a more candid admission than the above-quoted statements that the Government is attempting to rewrite the plain language of the consent order, in direct contravention of the principles of *Armour.*[16]

Armour does not stand alone in its requirement that the interpretation of a consent order be based on the plain meaning of the order's language. Established precedents in this Court and elsewhere have adhered to the same sound policy. *See, e.g., Hughes* v. *United*

---

[16] Further evidence that the Government here is attempting to rewrite and not to interpret the order is the fact that where the Government has wanted to establish a prohibition against holding as well as acquiring assets, consent orders have so stated. *E.g., United States* v. *General Motors Corp.*, 1968 Trade Cas. ¶ 72,356 (N.D. Ohio 1968). The Government's claim that such cases are distinguishable because they involve judicial decrees, violations of which are punishable by contempt (Gov. Br. 20), is unpersuasive: familiar language does not mean one thing when used by an agency in an order enforceable by the court and something quite different when used by the court in its own decree.

States, 342 U.S. 353, 357 (1952); *United States* v. *Atlantic Refining Co.,* 360 U.S. 19, 23-24 (1959); *Artvale, Inc.* v. *Rugby Fabrics Corp.,* 303 F.2d 283, 284 (2d Cir. 1962); *United States* v. *ASCAP,* 331 F.2d 117, 123-24 (2d Cir.), *cert. denied,* 377 U.S. 997 (1964).

The first case in which the Court spoke to the issue of consent decree interpetation was *Hughes* v. *United States, supra.* The Court there rejected the Government's argument that the Government's reading of the consent order was the only way in which the "purposes" of the decree could be achieved. While admitting that the "purpose" of the decree as stated by the Government might be frustrated, the Court held that once the parties entered an agreement they were bound by the language of that agreement, and that an attempt to "interpret" the agreement so as to create substantially new liabilities was in effect a modification of the original decree which could not be permitted. 342 U.S. at 357.

The Court returned to the issue in *United States* v. *Atlantic Refining Co., supra,* in which the Government claimed that its "interpretation" of the decree would be necessary to implement the purposes of the laws on which the decree was based. In rejecting this claim, the Court stated:

> "The Government contends that the interpretation it now offers would more nearly effectuate the 'basic purpose of the Elkins and Interstate Commerce Acts that carriers are to treat all shippers alike.' This may be true. But it does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues. And we agree with the District Court that accepting the Government's present interpretation would do just that." 360 U.S. at 23 (footnote omitted).

These cases represent wise policy, for they reflect the understanding that consent decrees are, like contracts, negotiated documents by which each party gives up some benefits in return for others. Accordingly, such documents must be interpreted, like contracts, in accordance with their agreed upon terms. Moreover, the tenets of *Armour* and its predecessors conform with the realities of the Government's own consent decree programs. As we show more fully below (pp. 32-6 *infra*), *Armour* by requiring adherence to the actual language of an order encourages companies to submit to negotiated decrees instead of forcing the Government to litigate the issues. As one leading authority has explained:

> "It must not be forgotten that the defendant, in reliance upon the terms of the consent decree, has bargained away its constitutional right to litigate the issue of liability. Thus, the government is able to obtain an "assured" and "immediate" result, without proof of the claims in the complaint —claims that, as one court has rightfully noted, might not be established at trial. Under these circumstances it would be unfair for a court to impose additional prohibitions solely on the basis of the government's claim that such relief is warranted to effectuate the decree's alleged purpose, when the defendant might never have entered the decree and, indeed, might have chosen to proceed to litigation had the government insisted on such relief in the first place. . . ." Handler, "Twenty-Fourth Annual Antitrust Review," 72 *Colum. L. Rev.* 1, 33-34 (1972) (footnotes omitted).

In this case, the task for the lower courts was one of simple construction. Thus, the courts were bound

to follow the time-honored principle reiterated in *Armour* that a consent order must be interpreted "as it is written" and not "as it might have been written." 402 U.S. at 681-82. The determination of both the District Court and the Court of Appeals that the prohibition against "acquiring . . . assets" forbade only the acquisition of assets is a clear and proper application of these established principles of construction.

B. The <u>Armour</u> Line of Decisions Precludes the Government's Attempt To Modify the Language of the Consent Decree by Relying on the Supposed "Purpose" of the Decree or of the Antitrust Laws.

The second prong of the *Armour* holding is the principle that the plain meaning of a consent order cannot be changed on the basis of its alleged "purpose" or the "purpose" of the underlying antitrust laws:

> "Naturally, the decree reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." 402 U.S. at 681-82.

The Government's position here is in direct contravention of this standard. Faced with the language of the consent order which yields no support for its attempted extension, the Government is forced to argue that the extension is justified by the supposed "purpose" of the order and of the antitrust laws: "such

remedial provisions [barring further acquisitions] have two broad *purposes*" (Gov. Br. 11); "Commission orders prohibiting acquisitions . . . are, *like Section 7, intended* to prevent the effects of an illegal acquisition" (Gov. Br. 14-15); "the *obvious purpose* of an order barring future acquisitions is to prevent the anti-competitive effect . . ." (Gov. Br. 16); "If the Commission order prohibiting future acquisitions is to perform a meaningful function in *effectuating the purposes of Section 7* . . ." (Gov. Br. 16); "The agreed *purpose* of the order . . . would be wholly defeated . . ." (Gov. Br. 17); "The Commission's order, no less than the underlying statute it implements, should be interpreted in a way that accomplishes rather than defeats its *purpose*" (Gov. Br. 19) (all emphasis supplied).[17]

The Government's contention that its "interpretation" of the consent order will effectuate its supposed purpose and the purpose of the antitrust laws is identical to the argument made by the Government and rejected by this Court in *Armour,* in *Hughes,* and in *Atlantic Refining.* See also p. 19, above. As the Court also noted in *Armour*—in language equally apposite here—the Government itself chose to bring suit under the decree and not under the antitrust laws. 402 U.S.

---

[17] The Eighth Circuit's opinion in *United States* v. *Beatrice Foods Co.,* 493 F.2d 1259 (8th Cir. 1974), *petition for cert. pending,* No. 73-1798 (Gov. Br. 12), is faulty for the same reason. The court there disagreed with the decision in this case and upheld daily penalties assessed under an "acquiring" clause similar to the one here on the grounds that "[s]uch a limited construction of the order ignores the crucial effects of an acquisition . . ." and that the purposes of Section 7 of the Clayton Act would not be effectuated by such an interpretation. *Id.* at 1270. The court failed even to consider the *Armour* decision in this context.

at 674-5.[18] Accordingly, the test was what the decree meant and not what could be argued in a suit, which the Government remained free to bring, to enforce Section 7 of the Clayton Act. This Court stated in *Armour:*

> "[A]lthough the relief the Government seeks may be in keeping with the purposes of the antitrust laws, we do not believe that it is supported by the terms of the consent decree under which it is sought." 402 U.S. at 683.

Thus, even were the Government's analysis of the purposes of Section 7 correct—which it is not—the intent of that statute does not govern the proper interpretation of this specifically limited consent order. Even if Section 7 were intended to prohibit the retention of illegally acquired assets as well as the acquisition itself, here the consent order explicitly bans only "acquisitions." A consent order represents a specific compromise that may resolve the controversy far short of the relief the Government might have accomplished if it had pursued its case to hearing and prevailed on the merits; and in exchange for the assurance of the bargained-for relief, the Government nor-

---

[18] The Court stated:

> "This case does not involve the question whether the acquisition of a majority of Armour stock by Greyhound is illegal under the antitrust laws. If the Government had wished to test that proposition, it could have brought an action to enjoin the acquisition under § 7 of the Clayton Act . . . . Alternatively, if the Government believed that changed conditions warranted further relief against the acquisition, it could have sought modification of the Meat Packers Decree itself. It took neither of those steps, but, rather, sought to enjoin the acquisition under the decree as originally written. Thus the case presents only the narrow question [of interpretation of the consent decree as written]." *Id.* at 674-75 (footnote omitted).

mally accepts somewhat less than it might have gained through litigation. Accordingly, what it has gained must be measured by the decree and not by the antitrust laws.

As it happens, the Government's analysis of Section 7 and the cases construing it is not persuasive. The Government asserts that Section 7 "must be construed to prohibit not just the acquisition but also the retention of the illegally acquired property, since it is that retention that gives rise to whatever anticompetitive effect the acquisition may have" (Gov. Br. 16). Yet there are many situations in which an acquisition does not result in a "retention of assets" yet has an effect on competition of the sort prohibited by Section 7. If, as has happened from time to time, a company acquired a competitor and immediately junked its assets, there would be no retention of assets; but surely Section 7 could be invoked to challenge the *acquisition's* impact on competition.[19]

This reading of Section 7 is supported, not contradicted, by *United States* v. *Du Pont & Co.,* 353 U.S. 586 (1957). Notably, the Government relies heavily on the view of the *dissent* in that case as to what the majority was holding (Gov. Br. 18). But the majority opinion did not consider that it was reading Section 7 to prohibit the retention as opposed to the acquisition of assets. As Justice Brennan stated the holding for the majority:

> "We repeat, that the test of a violation of § 7 is whether *at the time of suit,* there is a reasonable

---

[19] Conversely, unless there has been an "acquisition" within the meaning of Section 7, then clearly the statute has no application whatever competitive consequences may flow from the "holding" of property.

> probability that the *acquisition* is likely to result in the condemned restraints." 353 U.S. at 607 (emphasis supplied).

The fact that the Court found such a probability on the basis of post-acquisition developments does not change the stated principle that it was the acquisition and not the retention that Section 7 forbad. In short, even if *Armour* did not render the Government's argument irrelevant, its construction of the supposed "purpose" of Section 7 would not support its strained extension of the language of the consent order.[20]

The Government, obviously conscious of the principles reaffirmed in *Armour*, attempts to distinguish the present case in two principal respects. First, looking to the particular facts of *Armour*, the Government contends that the decree in *Armour* prohibited only certain behavior, and not all relationships between Armour and retail food businesses. Under the narrow terms of the decree, the fact that Armour was barred from acquiring a retail food business did not prevent a retail food business from acquiring Armour, even though the effect on the industry might be identical. Therefore, the Government claims, *Armour* would only be pertinent here if the Government sought under the consent order to prevent another firm from acquiring Continental. (Gov. Br. 23-25).

---

[20] Equally irrelevant is the decision in *Gottesman* v. *General Motors Corporation*, 414 F.2d 956 (2d Cir. 1969), where the Second Circuit held only that the Government's judgment in the same *DuPont* case was entitled to greater weight than the trial court had given it in determining, not merely whether the 1917 stock acquisition violated the Clayton Act, but also whether there was any actual injury therefrom at any time for which the plaintiff was claiming damages.

The significance of *Armour,* however, is not merely that it interpreted the decree in a way other than that urged by the Government. Rather, the Court expressly rejected the Government's argument that the decree could be interpreted on the basis of a "purpose" either of the decree itself or of the antitrust laws on which it was based, and held instead that the consent order had to be interpreted "within its four corners" as a negotiated contract. Moreover, when read "within its four corners," the present order, like the order in *Armour,* refers only to specific behavior. Nowhere does it speak in terms of "relationships" between Continental and other baking companies. Finally, the "harm" which the Government asserts will occur in the present case is identical to that claimed by the Government in *Armour:* in each case the Government argued that a company subject to a consent decree could avoid the "purposes" of the order. And, in each case, the consent order "as written" could not be read to achieve the Government's "purposes" without ignoring its plain language.

In a second attempted distinction, the Government asserts that the consent order here involved differs from the *Armour* order because the present order does have a "purpose" that can be discerned from the "Appendix" to the parties' settlement agreement.[21] The

---

[21] This argument is at odds with the Government's consistently expressed concern (*e.g.*, Gov. Br. 12) that the Tenth Circuit's decision will have a serious adverse effect on the Commission's antiacquisition program. It would not assuage this concern for the Government to prevail in this case on the basis of a collateral document peculiar to the consent order here, and presumably the Government did not petition this Court to review so unique and limited a question.

Appendix, as already noted, does not purport to provide a gloss for interpreting the decree but merely sets forth the background to provide the Commission a basis for approving the consent order. *See* p. 3, above. More important, after asserting that "the tendency toward concentration" is one of the problems facing the baking industry, the Appendix merely states that, in addition to requiring one divestiture, the order would bring to a halt Continental's prior practice of "acquiring" companies baking and selling bread (App. 84). There is nothing in these general statements to show that the consent order was intended to forbid anything other than acquisition of stock or assets.[22]

The existence of the Appendix militates against rather than for the Government's position in another respect. In *Artvale, Inc.* v. *Rugby Fabrics Corp.*, 303 F.2d 283 (2d Cir. 1962), the parties agreed to both a consent order and a separate agreement explaining the settlement. The court upheld the lower court's decision that the defendant had not violated the consent order by selling fabrics similar but not identical to those made by using plaintiff's patents. The court agreed with the plaintiff that the "spirit" of the agreement as manifested in the collateral document was broader than the exact words of the consent order, but

---

[22] The Government's attempt to isolate and emphasize the phrase relating to "concentration" is faulty for another reason as well. Not only does it ignore the particular means specified in the consent decree—the limit on acquisitions—but it implies an impossibly vague and expansive scope of the order. Obviously, Continental did not agree to forego every step or method of expanding its business(*e.g.*, better advertising, new banking techniques, growth in new territories) even though any of these steps might equally increase "concentration" in the industry.

held that this fact bolstered the court's interpretation of the decree based on its express terms:

> "They show, however, that broader terminology was available to the parties had they chosen to use it. The actual choice of language in the decree, therefore, is highly significant." *Id.* at 284.

Accordingly, even if the Appendix to the agreement embodying the consent order were read more broadly than the order, this would show only that Commission counsel and Continental could use broader language when they so chose, but failed to include such language in the order as finally agreed upon.

C. The Legislative History of the Civil Penalty Provisions Does Not Support the Government's "Interpretation" of the Consent Order.

The Government asserts, incautiously, that the legislative history of the penalty provisions "confirms" that each day of "retention" of assets acquired in violation of Commission order is a separate offense (Gov. Br. 21). However, since the lower courts concluded that the consent order did not prohibit the "retention" of assets, legislative history could not assist the Government on any view of the matter. In short, it was the limited language of that order, not the language of the civil penalty provisions, which precluded the Government from assessing daily penalties here.

The legislative history, so far as it casts any light on this case, strongly supports the view of the lower courts that the daily penalty provisions do not apply to the alleged violations here involved. The basic rule established by the penalty provisions of the Clayton and Federal Trade Commission Acts has always been to make "each violation" subject to a single penalty, which can now amount to $10,000 per violation. See

p. 8 above. The daily penalty provisions were added to each of the statutes long after their enactment not to replace the single penalty provisions but to supplement them by providing daily penalties in a narrow and comparatively unusual class of cases.[23]

As the language of the daily penalty provisions shows, daily penalties are permitted *only* where the violation constitutes a "continuing failure or neglect" to obey an order. The legislative history confirms what this language suggests, namely, that the daily penalty provisions were directed to that class of violations which were inherently continuing in nature and would, at least in the normal case, take the form of a refusal or failure to perform an affirmative act. Thus, the then General Counsel of the FTC explained, at the time that the daily penalty provision was added to the Federal Trade Commission Act in 1950, that its "principal value" would be to enforce Commission orders against "continuing conspiracies" such as "a continuing conspiracy to fix prices or control production." [24] The only other example given involved the maintenance of a billboard in defiance of an order prohibiting false advertising. *Id.*[25]

---

[23] Although the single penalty provision was added to the Federal Trade Commission Act in 1938, the daily penalty provision here relied on by the Government was not added until 1950. 64 Stat. 21. The corresponding daily penalty provision was added to the prior single penalty provision of the Clayton Act in 1959. 73 Stat. 243.

[24] Letter from the FTC General Counsel to Senator Fulbright, quoted in full at 96 Cong. Rec. 3026-27 (1950). It was the General Counsel who drafted the daily penalty provision. *Id.* at 3027.

[25] The General Counsel contrasted this example, where daily penalties would be applied, with individual radio advertisements, where each broadcast would be an individual violation subject to a single penalty. *Id.*

In 1959, when the same daily penalty provision was added to the Clayton Act, the same examples were brought to the attention of Congress. *Hearings on the Finality of Clayton Act Orders Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 86th Cong., 1st Sess. 21 (1959). The House Report on the bill referred in addition to two other related instances in which the daily penalty provision might be invoked "for a continuing offense": the report explained that the failure to obey "an order dissolving an unlawful merger" would be subject to daily penalties, and it gave as a related example an order directed against an interlocking directorship. H.R. Rep. No. 580, 86th Cong., 1st Sess. 7 (1959). These examples confirm that the focus of the daily penalty provision was upon inherently continuing conduct.

There is, quite plainly, nothing inherently continuing in the act of "acquiring" stock or assets in violation of an outstanding Commission order prohibiting the "acquisition." As the District Court stated in this case, once the allegedly unlawful acquisitions "were accomplished, the violations were complete" (Pet. App. 15A).[26] If anything, the individual acquisitions al-

[26] The Government argues that if "Congress intended that failure to obey a Commission order dissolving an unlawful merger was a continuing offense, *a fortiori* it would be a continuing offense to retain assets acquired in violation of an outstanding order prohibiting their acquisition" (Gov. Br. 22). The argument is a *non sequitur.* In one case the violation consists of acquiring assets, a discrete act which is completed when the assets are acquired; in the other instance, the violation consists in refusing to dissolve a merger, which is precisely the kind of inherently continuing refusal to act that the daily penalty provisions were intended to reach.

For the same reason, *United States* v. *Schine,* 260 F.2d 552 (2d Cir. 1958), *cert. denied,* 358 U.S. 934 (1959), is inapplicable to the present case. In *Schine,* the court merely upheld contempt con-

legedly violating the Commission's order are very much like individual radio broadcasts in violation of a Commission order against false advertising, and the legislative history shows quite clearly that such a case was not covered by the daily penalty provision but rather by the basic rule that each broadcast constitutes a separate, individual violation. See p. 29 n. 25 above.

Finally, the legislative history of the daily penalty provisions repeatedly emphasizes that the daily penalties were intended for a *narrow* class of violations. Thus, the General Counsel of the Commission, supporting the 1950 amendment, stated that the new language applied solely "in those infrequent cases" where the violation was a continuing one. 96 Cong. Rec. 3026 (1950). In 1959, a subsequent General Counsel, supporting the Clayton Act amendment, responded as follows to Congressional concern that daily penalty provisions might be used to amass huge penalties without giving respondents fair notice of their potential liability:

> "So far, since the passage of the [daily] penalty provision in the Wheeler-Lea Act [in 1950], we have found no continuing day-by-day offenses upon which we have sued. . . . *It is an unusual* thing, so we haven't yet brought any suits on the basis of a continuing offense day by day." *Hearings on the Finality of Clayton Act Orders, supra,* at 21 (emphasis supplied).[27]

---

victions for violation of an order in a Sherman Act case, based on the defendants' failure to divest properties as required by the decree and their continuation of other activities whose continuation was barred by the decree.

[27] The Congressional concern regarding the notice problem is underscored by this very case, where the Commission failed to notify Continental of its rapidly increasing liability despite the

It is clear, then, that the civil penalty provisions were intended to apply only to those unusual situations where the violation is an inherently continuing course of conduct. The instant situation manifestly does not present such unusual circumstances, and the Government's reliance on the history of the penalty provisions is misplaced.

D. The Government's Approach to "Interpreting" Consent Orders Will Thwart Rather Than Serve the Effective Operation of Its Consent Order Program.

In addition to its claim that daily penalties will effectuate the purposes of the decree and the antitrust laws, the Government asserts that the lower courts' decision will impair the Commission's anti-acquisition program (Gov. Br. 12-14). Such a contention cannot withstand scrutiny.

In the first place, the Government's professed concern that the lack of daily penalties under its anti-acquisition orders will result in widespread violations of those orders is based on a wholly unwarranted assumption that respondents to its orders are eager to violate the law in the absence of devastating monetary penalties. Despite the many outstanding orders forbidding acquisitions (*see* Gov. Br. 12), the Commission has not shown any pattern of widespread disobedience.[28] The Government's assumption is particularly unjusti-

---

Commission's knowledge of all the facts of the challenged transaction over a year before the filing of the complaint. See p. 7 above.

[28] So far as we are aware, this case and *United States* v. *Beatrice Foods Co., supra*, are the first cases in which the FTC has ever sought to collect daily penalties for alleged violations of its anti-acquisition orders.

fied by the record in the present case, since the District Court expressly found that Continental's actions were based on a "reasonable," if mistaken, reading of the consent order.

Equally unsound is the Government's asserted fear that the Commission's power to seek full injunctive relief, including divestiture, is an ineffective sanction as compared to purely monetary penalties (Gov. Br. 13-14). There are, no doubt, difficulties in implementing divestiture which may lead courts to apply such a sanction cautiously. But surely the risk of a fine of up to $10,000 coupled with the permanent loss of a profitable and fully integrated acquisition is a powerful deterrent to wanton violations of anti-acquisition orders.[29]

If daily penalties were in fact critical to enforcement of anti-acquisition orders, the Commission could readily provide for them without undertaking to distort the language of existing decrees. For decrees issued hereafter, it would be both remarkable and perverse if the Commission failed to insist on broader language prohibiting both "acquiring" and "holding" of forbidden stock or assets. As for decrees already outstanding, the Commission is always free to utilize its power to "modify" existing orders, after appropriate proceedings, to include an explicit ban on the continued holding as well as the acquisition of assets. 15 U.S.C. §§ 21(b),

---

[29] In point of fact, the Commission can utilize contempt proceedings to punish respondents who violate cease and desist orders where the Commission has obtained a court order enforcing its cease and desist order. In such contempt proceedings, even criminal penalties are available.

45(b).[30] The fact that it has not done so, to our knowledge, deprives its "policy" arguments of any remaining force they might otherwise have had.

In actuality, policy considerations, invoked by the Government in support of its position here, militate far more strongly against its attempted rewriting of the consent order. It is well recognized that the consent order procedure is as much, if not more, a benefit to the Government as to defendants. By passage of Section 5(a) of the Clayton Act, 15 U.S.C. § 16, Congress gave statutory sanction to consent decrees by exempting them from use as prima facie evidence against the defendant in civil antitrust actions. The clear purpose of this exemption is to induce defendants to submit to consent judgments so that the Government may avoid the risk and expense of litigation. *See, e.g., General Electric Co.* v. *City of San Antonio,* 334 F.2d 480, 486 (5th Cir. 1964) ("the obvious purpose and function of the proviso of Section 5(a) is to encourage capitulation by the trusts, thereby saving the government great expense . . . ."); *Deluxe Theater Corp.* v. *Balaban & Katz Corp.,* 95 F.Supp. 983, 986 (N.D. Ill. 1951). As intended, the congressionally sanctioned consent decree has become the primary tool of Government antitrust enforcement. Note, 73 Colum. L. Rev. 594 (1973) (70 to 80 percent of Justice Depart-

[30] The Commission is presently conducting a proceeding to consider a purported "modification" of the consent order here involved, which expired in 1972, to extend its term. *Continental Baking Company,* (FTC Dkt. 7880). ITT Continental is opposing this "modification" on grounds not involving the meaning of the "acquiring" clause at issue in the present case. It is noteworthy, however, that the Commission is seeking to extend the order's prohibition while at the same time it is here claiming that the prohibition has been rendered useless.

ment antitrust complaints terminate in consent decrees).

It is thus of paramount importance that the Government not create substantial disincentives to defendants negotiating such antitrust settlements whether in the Commission or in the courts. As the Second Circuit recognized in *United States* v. *ASCAP,* 331 F.2d 117, 123-24 (2d Cir.), *cert. denied,* 377 U.S. 997 (1964):

> "It is important to the obtaining of consent decrees, *on which the effective enforcement of the antitrust laws depends in no small degree,* that defendants who sign them should know these will not be stretched beyond their terms" (emphasis supplied).

The present attempt of the Government to have the court read "acquiring" to mean "acquiring and continued holding" of assets is just such an example of an attempt to stretch a consent order beyond its terms. If, under the guise of interpretation, consent orders can be substantially modified in this fashion, companies faced with future anti-acquisition orders will have a strong incentive to litigate in the first instance rather than compromise.

The Government's approach would undermine the consent decree process in an additional respect. Under *Armour,* the meaning of the decree can normally be ascertained by examining its plain language. Under the Government's approach, however, all certainty is lost because construction of the decree would always be open to disputes based on will of the wisp conjectures about the "purpose" of the decree, the "purpose" of the statute, and such other extraneous factors as either side chooses to invoke. This process not only

discourages settlements, but it makes every settlement which is reached the occasion for still further litigation, burdening the courts and the litigants alike. Thus, it is the Government's position here, and not the Tenth Circuit's decision, that would result in serious adverse effects for the Commission's own enforcement program.

III. EVEN IF THE CONTINUED HOLDING OF ACQUIRED ASSETS CONSTITUTES A CONTINUING VIOLATION OF THE PRESENT CONSENT ORDER, THE GOVERNMENT CANNOT ASSESS DAILY PENALTIES IT CLAIMS AGAINST ITT CONTINENTAL.

A. ITT Continental Is Entitled To Raise Each of the Three Issues Set Forth Below.

If the Court agrees with the District Court and the Court of Appeals that daily penalties cannot be assessed in this case in light of *Armour* and the express terms of the consent decree, then this case is at an end. If, however, the Court accepts the Government's position that daily penalties are permitted, then it will be necessary for the Court to consider the three additional issues set forth below which raise alternative grounds for denying or limiting the daily penalties sought by the Government. These questions are: (1) whether the three distributorship contracts in question were acquisitions; (2) whether daily penalties can be assessed against a bona fide and previously unrelated successor to the company charged with violations; and (3) whether the Commission's failure to notify ITT Continental of its mounting liability precludes or limits daily penalties.

The Government's brief asserts (Gov. Br. 25-27) that the first two issues are not before the Court because ITT Continental did not cross-petition for certiorari and its arguments if accepted would result not

in affirmance but in modification of the Court of Appeals' judgment. As to the third issue, the Government states (Gov. Br. 27) that this Court "need not" consider it because any failure of the Commission to give prompt notice of its position may be considered by the District Court on remand in its discretionary determination of the amount of the daily penalties.

The Government's position that the first two questions may not be considered in the absence of a cross-petition is inconsistent with the position it took only last year, and presents an important question of Supreme Court practice that must be resolved if the Court should sustain the Government on the *Armour* issue discussed above.[31] Until recently, it appeared to be well settled under long-established precedents that ITT Continental could, without cross-petitioning, make any argument it wished to sustain the judgment below or to limit the scope of any modification or reversal.[32]

---

[31] Whether a cross-petition is needed when a respondent does not seek to overturn the judgment below but simply to sustain it on alternative grounds or limit the impact of reversal is discussed in detail in a recent article by a leading expert on Supreme Court practice. Stern, "When to Cross-Appeal or Cross-Petition—Certainty or Confusion?," 87 Harv. L. Rev. 763 (1974). Stern not only shows that the Government's present position is contrary to precedent and sound policy, but observes that the Government took essentially the opposite position in *Strunk* v. *United States*, 412 U.S. 434 (1973).

[32] The leading cases are *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435-36 (1924); *Langnes* v. *Green*, 282 U.S. 531, 535-39 (1931); *Morley Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191-92 (1937). *American Express* was cited only recently in *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 n.6 (1970), and the rule it espouses has been regarded as settled by numerous commentators. See authorities cited in Stern, *supra*, 87 Harv. L. Rev. at 763 n.2.

Under this principle the respondent is entitled to advance his alternative arguments even though they "may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States* v. *American Express Railway Co., supra,* 365 U.S. at 435. It is thus only where the respondent seeks to have this Court overturn an adverse portion of the judgment entered below that the respondent must file his own petition. In this case, ITT Continental is not seeking to challenge the three single penalty judgments sanctioned by the Court of Appeals, but merely resisting or seeking to limit the assessment of *daily* penalties against it above and beyond the single penalties adjudged below.

In seeking to foreclose the alternative arguments made by ITT Continental, the Government relies on three recent decisions of this Court which it reads as establishing a limitation on the general principle established in *American Express.*[33] The Government's reading of these cases would establish a limitation on the

[33] *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973); *National Labor Relations Board* v. *International Van Lines,* 409 U.S. 48, 52 n. 4 (1972); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381, n. 4 (1970). These decisions can be read in several different ways (see Stern, *supra,* 87 Harv. L. Rev. at 769-70) and the result reached is consistent with the undisputed rule that this Court is always free as a matter of discretion to refuse to consider a question otherwise properly presented (*e.g.,* because it is frivolous or has no general importance). No one can reasonably suggest that any of the three alternative grounds here involved present issues which are frivolous or unique. The first issue could arise under any order forbidding "acquisitions," and the Government has itself shown that numerous such orders are outstanding (Gov. Br. 12). The other two issues, involving the liability of successor corporations and the consequences of a failure of the Commission to give timely notice, could also arise in any number of cases involving Commission orders.

general principle of *American Express* that is neither unsound nor workable: it would result in a flood of unnecessary cross-appeals and cross-petitions to protect against a possible waiver under the new limitation; it would deprive respondents having entirely meritorious alternative defenses of a just result; and it would establish a new governing principle that would be very difficult to apply in practice and would itself generate new litigation without serving any useful purpose.[34] Accordingly, the Government's reading of these cases should be rejected and the long established principle of *American Express* should be reaffirmed.

Even if the Government's proposed limitation were sound, which it is not, it demonstrably would apply only to the first issue raised by ITT Continental and not to the second or third.[35] The limitation advanced

---

[34] These considerations are developed by Stern with such persuasive force that it is unnecessary to elaborate them here. See 87 Harv. L. Rev. at 772-77. It is, however, worth repeating Stern's observation that the principal victim of the distinction now urged by the Government would be the Government itself; for, the necessity to cross-petition in order to reserve alternative grounds to sustain the result below would bear most heavily on the Government, which is confronted with more than a thousand certiorari petitions every year. *Id.* It would be of no benefit to the Government (or this Court) to establish a rule that required the Government to screen hundreds of individual cases in advance of certiorari to identify all alternative grounds and then to file numerous protective cross-petitions for certiorari.

[35] Even the Government does not suggest that a cross-petition is always necessary to reserve and present alternative grounds for affirming the decision below. The distinction it seeks to draw is between grounds that would logically lead only to affirmance and grounds that in logic would result "not in affirmance but in substantial modification" of the lower court's judgment (Gov. Br. 25).

by the Government would apply only where as a logical matter accepting an alternative ground raised by a respondent would not only uphold the judgment so far as it favored respondent but would also permit in theory modifying the judgment below to deprive the petitioner of what it had won. Acceptance of ITT Continental's second and third grounds clearly would not have such an effect: even if both arguments were accepted, the single penalties established by the Court of Appeals' judgment would remain standing, and the only result of the arguments would be to preclude or limit the Government's collection of daily penalties, which the lower courts did not award. Even by the Government's own standard, therefore, these two arguments must be faced on the merits if the lower courts' construction of the consent order is set aside.

The Government's contrary argument regarding ITT Continental's second ground rests on a misunderstanding of what respondent has argued. The Government asserts that "if ITT Continental is not a successor of Continental, then, theoretically at least, no penalties should have been assessed against it" (Gov. Br. 26). This is incorrect because ITT Continental has never denied that it is liable for any debts or penalties owed by Continental for its acts prior to the merger; the alleged acquisitions here occurred prior to the merger; and accordingly acceptance of ITT Continental's argument on a successor's liability would not result in disturbing single penalties established by the

ITT Continental does not, of course, request any modification of the judgment below; but the Government's position apparently is that, in logic, an acceptance of ITT Continental's first argument that no violations existed would theoretically permit a reversal of the single penalties imposed below, as well as a refusal to assess daily penalties.

lower court. Instead, the only result would be to preclude the Government from obtaining daily penalties from and after the date of the merger.

With respect to the third ground, the Government does not pretend that consideration is precluded but merely says that the Court "need not" reach the issue since the District Court could on remand reduce the amount of penalties to compensate for any unreasonable delay by the Commission in giving notice of its position (Gov. Br. 27). This contention misconstrues the thrust of ITT Continental's argument, which is that the Commission is barred as a matter of law from asserting daily penalties after the time at which it should have notified Continental of its jeopardy. Such a legal determination is entirely independent of the trial court's discretionary power to reduce the penalty and should logically be considered before any such exercise of discretion is undertaken.

B. None of the Three Distributorship Arrangements With Former Producers and Sellers of Bread Constituted an "Acquisition" Under the Terms of the Consent Order.

In holding that the Bon Ton, Wyoming, and Sheppard supply contracts violated the consent order, the Court of Appeals found that in each of the three transactions Continental indirectly acquired "the market and volume . . . a principal asset" of each bakery (Pet. App. 7A). It thus adopted the Government's position that the distributorship arrangements themselves comprised a forbidden acquisition. This holding is manifestly incorrect.

That Continental did not "acquire" any assets of the three bakeries in violation of the consent order is most apparent from an examination of the Sheppard trans-

action. The owner of Sheppard, Mr. Hebert, had decided for his own reasons to go out of business (App. 50). After unsuccessful efforts to sell the entire business to other companies, he decided to abandon production but to remain in business as a distributor and sell (*id.*). This decision led him to seek the supply contract with Continental which the Court of Appeals found to be a violation of the consent order (*id.*). Under this contract Continental, which had previously supplied Sheppard with cake products, undertook to supply its needs for all bakery products, including bread and rolls (App. 49-50). After the agreement was signed, Continental-labeled products generally replaced Sheppard-labeled products in Sheppard's trading area. Yet Sheppard remained and continues today to be a separate and independent company, selling bakery poducts on the same routes and to the same customers as it had prior to the distributorship agreement (App. 51). Sheppard's market volume is its own and forms the basis of its profit or loss. In fact, when in 1973 Sheppard became dissatisfied with ITT Continental's service under the distributorship contract, it terminated that contract and since then has bought its products from a competitor of ITT Continental.

To hold on these facts that Continental violated the consent order would require a total distortion of the normal meaning of the term "acquisition." In doing so, the Government is attempting to equate two familiar but quite distinct concepts: an acquisition and a distributorship arrangement. The former involves a discrete transfer and relinquishment of stock or assets and, in most situations, results in the disappearance of an independent business entity; the latter involves a contractual relationship between ongoing business enti-

ties.[36] The former may be challenged under Section 7 of the Clayton Act; the latter usually falls under the Sherman Act. *See, e.g., Hoopes* v. *Union Oil Co.,* 374 F.2d 480 (9th Cir. 1967). In short, by agreeing to supply bread to a company to which it already supplied cake, Continental was in no sense "acquiring" any of the company's assets or stock, but was rather entering a contractual relationship with an independent distributor.

The Commission itself clearly recognizes this familiar distinction, for where it has sought to prevent companies from engaging in distributorship arrangements as well as acquisitions, it has negotiated consent orders that include clear and explicit prohibitions of such transactions. *E.g., Textron, Inc.* (FTC Dkt. C-1740, May 22, 1970), *Imperial Chem. Indus., Ltd.* (FTC Dkt. C-2175, March 22, 1972);[37] *Frito-lay, Inc.* (FTC Dkt. 8606, August 28, 1968);[38] *Hercules, Inc.* (FTC Dkt. C-1794, September 23, 1970), *United Indus.*

---

[36] As this Court has stated, the amended Section 7 is directed essentially against the range of "corporate amalgamations." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 342 (1963). To be sure, an "asset acquisition" may be limited to only certain assets of the selling company; but "in an asset acquisition, however, the shareholders of the selling corporation . . . retain no interest in the assets transferred." *Id.* at 337. It can hardly be said in this case that Sheppard's distributorship agreement deprives it of a continuing interest in its customer lists, route lists, or any other asset it had previously possessed.

[37] Respondent prohibited from obtaining "the market share, in whole or in part, of [any] concern. . . ."

[38] Prohibition applied where "such [concern] discontinues manufacturing any of said products under a brand name or label owned by such [concern] and thereafter distributes any of said products under any of respondents' brand names or labels."

Syndicate, Inc. (FTC Dkt. C-1860, February 12, 1971).[39] No such provisions or anything like them were included in the present consent order, nor even alluded to in the accompanying agreement.

Thus, as with the question of "holding" assets, the Government is again forced to argue that "acquiring" does not mean what it says, but rather that the term covers mere entry into a supply contract with a firm that has unilaterally ceased production of its own products. There is as little justification for distorting the plain meaning of the consent order language in this respect as there is with regard to the penalty issue. Even if the Court accepted the Government's contention that the "purpose" of the order and of the antitrust laws must be considered in establishing the scope of the order's prohibition, an examination of the order, the complaint on which it is based, and the Appendix to the initial agreement will reveal absolutely no expression of intent by either party to prohibit the supply contracts here in question.

Moreover, such a "purpose" test proves too much in the present context, since it would embrace activities having the same result as the challenged distributorship, but which could not in any sense be considered violations of the consent order. Thus, on the Government's theory the distributorship agreement must be condemned because it resulted in Continental obtaining Sheppard's "market" and "volume" (Pet. App. 7A).

---

[39] Prohibition applied where "such concern discontinu[es] the manufacture, distribution or sale of such products and thereafter transfer[s] to respondent customer lists or in any other way mak[es] available to respondent access to customers or customer accounts."

However, Continental clearly could have distributed its own bread products directly to Sheppard's customers, and to the extent it was successful, could thereby have acquired Sheppard's "market" or "volume" without even arguably infringing the consent order. This example graphically illustrates the difficulties that arise when the plain language of a consent order is abandoned in favor of its supposed "purpose."

Finally, the Court of Appeals' reliance upon *United States* v. *Columbia Pictures Corp.*, 189 F.Supp. 153 (S.D.N.Y. 1960), the only decision it cited on this aspect of the case, is clearly misplaced. There, the court found that a film distribution arrangement involving particular films effectively involved an acquisition by the distributor of the suppliers' assets. Even assuming that decision was sound [40] and was not otherwise distinguishable,[41] the approach adopted would if applied here suggest only that Sheppard (the distributor) might have acquired assets of Continental (the supplier), whereas the only transaction forbidden by the consent order is the reverse.

The Court of Appeals agreed with ITT Continental and the Commission that the agreement between Continental and Sheppard was "in all relevant respects, virtually identical to the agreements entered into between Continental, and Bon Ton and Wyoming . . ."

---

[40] Compare the same court's subsequent decision in *United States* v. *Allied Chemical Corp.*, 1964 Trade Cas. ¶ 71,193 (S.D. N.Y. 1964).

[41] In Columbia Pictures, a specific set of assets—Universal's pre-1948 copyright feature films—were exclusively confided to the distributor. 189 F.Supp. at 183. The present case involves only a conventional supply contract whereby Continental agreed to provide such bread products as Sheppard might require.

(Pet. App. 6A). The only distinction between Sheppard and the other two transactions is that in the latter cases Continental eventually did acquire the distributorships due to events subsequent to the original transactions. But of course, at the time of acquisition these distributorships were not concerns "engaged . . . in the production and sale of bread and bread-type rolls," and since the express terms of the consent order limited Continental only as to acquisitions of such concerns, the ultimate acquisition of the Bon Ton and Wyoming distributorships were not violations of the consent order.

As the Court of Appeals implicitly recognized, these ultimate acquisitions had no bearing on the initial distributorship arrangements, and thus those arrangements could no more be considered violations than could the Sheppard transaction. Accordingly, Continental's belief that the terms of the consent order permitted such distributorships was not only "reasonable" as the District Court found, but was in fact the only appropriate interpretation of the consent order as it is written. Since there were no violations of the order, daily penalties cannot be assessed.

C. Daily Penalties for Post-Merger Activities Could Not Be Assessed Against ITT Continental Which, as a Bona Fide and Previously Unrelated Successor to Continental, Was Not Subject to the Consent Order "As Written."

The consent order by its terms applied only to Continental and on September 13, 1968, Continental ceased to exist. See p. 5 above. Both lower courts held that daily penalties could not be assessed under the consent order for "retaining" of assets but only for "acquiring" them, and accordingly neither sought to impose such penalties on ITT Continental for retain-

ing forbidden assets after September 13, 1968.[42] If this Court should hold that daily penalties were permitted under the consent order for retaining assets, then it will be necessary for it to decide whether as a matter of law the consent order applied directly to ITT Continental so as to give rise to daily penalties between September 13, 1968, when Continental ceased to exist, and December 13, 1968, when the present suit was filed. Both the language of the consent order and the law on successorships indicates that ITT Continental cannot be so bound.

To determine the successorship issue, it is once again necessary to return to the language of the consent order "as written," and to the principles of *Armour* in interpreting such language. FTC orders which bar future acquisitions (or other activities) often do apply by their terms to "successors" to the respondent company named in the order. For example, the consent order issued in *Cole National Corporation,* 71 F.T.C. 1504, 1510 (1967), applied to "respondent Cole National Corporation, its subsidiaries and affiliates and any successor to substantially all of its assets . . . ." Other orders similarly apply to the respondent and "successors and assigns to any substantial part of its assets," [43] the "respondent and its successor in interest," [44] or to

---

[42] The penalties were imposed only for "acquisitions" made in 1966 and 1967 when Continental was extant and fully subject to the consent order. ITT Continental, while denying that it was itself subject to the consent order, never contested its liability under the merger agreement for the monetary penalties that had accrued against Continental at the date of merger based on Continental's pre-merger conduct.

[43] *E.g., Gates Rubber Company* (FTC Dkt. C-2137, January 21, 1972).

[44] *E.g., Foremost Dairies, Inc.,* 67 F.T.C. 282, 284 (1965).

the respondent and its "successors and assigns."[45] The instant order contains no such language.

Because *Armour* requires that a consent order be construed in accordance with its terms, there is no basis in the present case for extending the order to apply it to a successor whose subjection to the order was not contemplated by its express terms. The policy underlying the *Armour* decision to protect reliance on the terms of a consent decree as written applies with even more force to the situation here, for the presence of a "successors and assigns" clause in the consent order would at least have put ITT Continental on notice before entering the merger in 1968 that it might itself be bound by the order. To hold now that ITT Continental is indeed bound by such an order which makes no reference to "successors," and by reason of such a holding to subject ITT Continental to a substantially increased penalty, is exactly the type of harm that the policy of construing consent decrees within their four corners is intended to prevent.

That the absence of language applying the consent order to Continental's successors is dispositive here is confirmed by the facts as well as the rationale of the *Armour* decision. In that case the Court held that the provisions of a consent decree which did not purport to bind Armour's "successors and assigns" did not apply to a company that acquired Armour. The Court observed that the Government could have argued that the acquiring company was bound by the order "[i]f a 'successors and assigns' clause had been included . . . ." 402 U.S. at 680. The absence of such a clause in the

---

[45] *E.g., Hercules, Inc.* (FTC Dkt. C-1794, September 23, 1970).

order in this case must, as it did in *Armour,* preclude the application of the order to a successor.[46]

Even assuming that the absence of a "successors" clause in the instant consent order were not dispositive of the successorship issue, ITT Continental as a bona fide and previously unrelated successor to Continental cannot be bound by the order directed solely against Continental. A long line of precedents in both the courts and the Commission confirm that a company cannot be bound by an order entered against its predecessor unless there is substantial continuity of ownership and management, so that the the successor appears to be merely a means of avoiding the order's requirements.[47] These decisions have typically involved situations where a family-owned corporation is dis-

---

[46] *Regal Knitwear Co.* v. *NLRB,* 324 U.S. 9 (1945), cannot aid the Government here. That case simply held that the inclusion of a "successors" clause in a *litigated* decree could not *enlarge* the scope the order would have by virtue of Rule 65 of the Federal Rules of Civil Procedure. *Armour* established the distinction between litigated and consent orders, and held that in the latter the absence of a "successors" clause was relevant in determining whether the parties had agreed to bind successors. To the extent that the two cases cannot be reconciled on this ground, *Armour* must be deemed to have qualified *Regal Knitwear sub silentio,* for the holding in *Armour* rejected the argument expressly made by the Government that under *Regal Knitwear* the absence of a "successors" clause was irrelevant. *See* Brief for the United States, p. 27 & n. 17, *United States* v. *Armour & Co.* (O.T. 1969, No. 103), incorporated by reference in Jurisdictional Statement of the United States, p. 3, *United States* v. *Armour & Co.* (O.T. 1970, No. 759).

[47] *See, e.g., Walling* v. *Reuter,* 321 U.S. 671 (1944); *NLRB* v. *Tempest Shirt Manufacturing Co.,* 285 F.2d 1 (5th Cir. 1960); *P. F. Collier & Son Corp.* v. *FTC,* 427 F.2d 261 (6th Cir.), *cert. denied,* 400 U.S. 926 (1970). *A&M Karagheusian, Inc.,* 68 F.T.C. 452 (1965); *Avon Publications, Inc.,* Trade Reg. Rep. ¶ 18,861 (FTC 1969). *See also, Regal Knitwear Co.* v. *NLRB, supra,* at 14-15.

solved but continues unchanged under the same ownership; where the successor firm is wholly owned by the owner of the company initially subject to the order; or where a pre-existing subsidiary company is succeeded by the parent or another subsidiary. In such instances, the continuity of ownership and control permits an inference that the reorganization was accomplished at least in part for the purpose of escaping the restrictions of an order, thereby justifying an extension of the order against the successor.[48]

The facts of the present case do not even remotely resemble the situations described above. It is undisputed that:

(a) The merger between ITT Continental and Continental was the result of "protracted arms-length negotiation" between two previously unrelated and independent companies, neither of which owned stock in the other (App. 32-33);

(b) "The merger was to no extent whatever entered into or consummated for the purpose of evading the consent order in any way" (App. 33);

(c) There has been a major change in management control from a situation where Continental's officers constituted a majority of Continental's board of directors to a situation where ITT Continental's

[48] Thus, in *Walling* v. *Reuter, supra,* a case heavily relied upon by the Government below, the Court found appropriate circumstances to bind a successor where it appeared that a family-owned business "successfully avoided all responsibility for compliance with the judgment entered against the family corporation, by the simple expedient of dissolving it and continuing the business under the individual control of members of the family . . . ." 321 U.S. at 675.

officers do not constitute a majority of the board (App. 33-34); and

(d) As a direct result of the merger there has been a major change in ownership from a situation where Continental's more than four million shares of stock were owned by more than 11,000 persons, no one of which owned more than 4 percent, to a situation where all of ITT Continental's stock is owned by a single person, ITT (App. 33).

These undisputed facts show that the merger was a bona fide and arms-length business transaction. They show that the merger was not accomplished to evade the consent order, and that there was no substantial continuity in the ownership and control of Continental as a result of the transaction. Accordingly, the policies which have led courts to bind successors to orders issued against their predecessors do not exist in this case, and quite apart from the absence of a "successors" clause in the present consent order, ITT Continental cannot be bound by the order.

Finally, ITT Continental cannot be subjected to the consent order against Continental on the ground that it succeeded to the "liabilities" of Continental under the terms of the merger. Although such a theory was suggested by the District Court's opinion (compare Pet. App. 16A), in the Court of Appeals the Government sought to minimize this contention,[49] and it was not adopted by the Court of Appeals. In fact, this theory is supported neither by reason nor by precedent.

---

[49] In its reply brief below (p. 39), the Government argued that it was "wrong" to read the District Court opinion as making ITT Continental's contractual assumption of liabilities the decisive factor in determining whether it was bound by the consent order.

The record in this case does not support the conclusion that ITT Continental gratuitously assumed, for the benefit of the Commission, an obligation to comply with Commission orders which would not have existed but for such an assumption. Nor can any such commitment be inferred from a general undertaking to assume the "liabilities" of Continental which, in the context of a merger, necessarily refers to its normal, outstanding financial debts and obligations. Surely, if a successor agreed before sentencing to assume the "liabilities" of a convicted criminal, one would not expect the successor to serve the jail sentence, but only to pay the debts.

As already noted, ITT Continental did not dispute its financial liability for alleged violations of the consent order committed by Continental prior to the merger, but this alone cannot justify any holding that ITT Continental itself became subject to the order after the merger so that new, daily penalties could arise based on its conduct from the date of the merger. The Government has, indeed, cited no case in which a bona fide and previously unrelated successor by merger has been held as such to be bound by an order against a predecessor company that has been dissolved as a result of the merger. Accordingly, daily penalties even if otherwise permitted cannot be assessed against ITT Continental with respect to post-merger activities.

D. The Commission May Not Recover Daily Penalties for Periods After It Reasonably Should Have Informed Continental or ITT Continental of the Asserted Violations.

There is a final important issue that must be resolved if this Court decides that ITT Continental can be held liable for continuing violations of the consent order.

In this case, the Commission, despite full knowledge of the facts underlying the challenged transactions, and despite a final decision to certify those facts and a draft complaint to the Attorney General, never informed Continental or ITT Continental prior to the filing of the complaint that the Commission regarded the three transactions to be continuing violations of the consent order. Fundamental considerations of fairness and due process of law, as well as the Commission's own procedures, prohibit the Commission from asserting daily penalties for a period during which it has had available all the relevant facts pointing to an alleged violation, but has needlessly allowed those penalties to accumulate by failing to advise the party subject to the order of its potential liability.

Although the Commission had completed its factual inquiries to Continental regarding the distributorship arrangements by June 1967 (see p. 7, above), it was not until 14 months later that the Commission certified to the Attorney General its contention that the order had been violated and that the violations were continuing. Continental had voluntarily cooperated with the investigation (*e.g.*, App. 114-116). One month after certification of the facts and the draft complaint to the Attorney General, ITT acquired the stock of Continental and merged Continental into ITT Continental. Yet, not until this action was commenced in December 1968 did ITT Continental become aware that the Commission believed a violation had occurred and was continuing.

The District Court correctly ruled that it would be "unreasonable" to allow the Commission "to knowingly let daily penalties accrue without giving notice of the

Commission's position at the earliest reasonable time" (Pet. App. 15A). This determination accords fully with sound policy. Absent such a warning, a respondent can easily be "mouse trapped" into a potential liability for virtually millions of dollars.[50] Not only is there no excuse for failing to give a respondent notice of the Commission's position at the earliest reasonable time, but there is a strong public justification in favor of doing so since notice will encourage a respondent either to abandon the challenged conduct or to take prompt measures to secure a definitive determination whether the conduct is lawful. See p. 56 below.

In amending the applicable statutes to permit daily penalties, Congress certainly did not contemplate that the daily penalty provisions should be used to permit the accumulation, without notice, of huge and ever increasing penalties, after the Commission has been apprised of the conduct it deems to violate its order. Indeed, the danger of such excessive penalties was raised by at least one Congressman in the Committee hearings directed to the 1959 amendment which added the daily penalty to the Clayton Act. In addition to assuring the Committee that actions for daily penalties were extremely rare, the Commission spokesman responded by testifying that "We never yet have requested a certification [to commence a penalty action] without first notifying the respondent that he is considered to be in violation and affording him an opportunity . . . to come in and discuss the matter . . . ."

---

[50] For example, in this case, the 19 month delay would, at the $1,000 per day penalty sought by the Government, represent over $1.7 million in unnecessary and unjustified penalties. At the present maximum statutory penalty, the amount would be over $17 million.

Hearings on Finality of Clayton Act Orders, supra, at 22.

At the very least, therefore, the daily penalty provisions should not be construed to authorize the accumulation of daily penalties from and after the earliest point when the Commission reasonably could have given the respondent notice of its position. This view fully accords with the settled principle that statutes should be construed to avoid unfairness or oppression, *e.g., Carlisle* v. *United States,* 83 U.S. (16 Wall.) 147, 153 (1872), and this canon has been followed even in cases where the statutory language did not easily comport with such a solution. *E.g., Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 285-87 (1956). Nothing in the language of the daily penalty provisions precludes this reading and, as already noted, it will necessarily serve the public interest by resolving such controversies at the earliest possible time.

The limitation recognized by the District Court derives not only from public policy and a sound reading of the statute but from the Constitution itself. Due process does not permit an agency, without any justifiable excuse, to sit idly by for nineteen months allowing the continuation of conduct known to the agency and believed by it to be unlawful and then to assess and collect daily penalties for the conduct during that same period. Administrative conduct so arbitrary, unreasonable, and prejudicial to a respondent must be deemed to be forbidden by the Fifth Amendment.

Moreover, the due process obligation to provide such notice is greatly enhanced where, as here, there was and continues to be reasonable doubt whether the con-

sent order forbids the transactions in question.[51] It is well established that a penalty may not be imposed where the governing standard of conduct is such "that men of common intelligence must necessarily guess at its meaning and differ as to its application."[52] This principle clearly applies to FTC consent orders and, at least where reasonable doubt about their application exists, precludes the collection of daily penalties in the absence of proper notice. *See United States* v. *Beatrice Foods Co., supra,* 493 F.2d at 1269. The Commission's failure to notify ITT Continental at the earliest reasonable time not only subjected the company to the risk of substantial penalties despite its "reasonable" reading of the order, but it also denied the company the opportunity to limit the accrual of substantial penalties by anticipating the penalty action with a declaratory judgment action of its own or by other appropriate measures. *E.g., St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 225-26 (1961); *Conti-*

---

[51] Here, the District Court specifically found that ITT Continental's reading of the consent order was "reasonable" (Pet. App. 14A). This appraisal is further confirmed by the action of the District Court for the District of Columbia in *National Dairy Prods. Corp.* v. *F.T.C.*, Civ. No. 1071-68 (D. D.C. 1968). There the FTC sought to use the anti-acquisition clause in a consent order to preclude distributorship arrangements and, in the captioned civil action, the District Court found this construction sufficiently dubious that a preliminary injunction against the Commission was justified. The opinion of that court is set forth at pp. 55-56 of ITT Continental's brief in the court below in this case.

[52] *See Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961), quoting from *Connolly* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). *See also Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966); *Champlin Ref. Co.* v. *Corporation Commission of Oklahoma,* 286 U.S. 210 (1932).

nental Baking Co. v. *Dixon,* 283 F.Supp. 285 (D. Del. 1968).[53]

In the court below, the Government did not in substance deny that the Commission should advise a respondent of the Commission's position at the earliest reasonable time. Rather, in its opening brief (p. 45) it suggested that the trial court could as a matter of discretion reduce the penalty otherwise applicable to compensate for any undue delay, and it repeats this suggestion in its opening brief in this Court (Gov. Br. 27). The question here, however, is not whether a lesser penalty may be imposed as a matter of judicial discretion; it is whether, as a matter of law, daily penalties of any amount are precluded from and after the point when such notice should have been given. As we have shown, public policy, Congressional understanding, and due process itself require an affirmative answer.

CONCLUSION

For the reasons stated in Part II of this brief, the judgment below denying daily penalties should be affirmed on the ground given by the lower courts. Alternatively, if the lower courts are found to have

---

[53] In *Dixon*, the court held that:

> "The Commission has the obligation to determine and to inform parties whether and to what extent their conduct may be in violation of a cease and desist order. It is only after the Commission has made such a finding that the penalties contemplated by 15 U.S.C. § 45(*l*) could be assessed, and only from that day forward. Any other interpretation of the statute and regulations would raise serious questions of due process." *Id.* at 287-88.

Here, ITT Continental urges only that the failure to give such notice precludes assessing daily penalties after "the earliest reasonable time" at which the Commission could have given notice.

erred, this Court should nevertheless affirm the denial of daily penalties (or appropriately limit such penalties) on the alternative grounds set forth in Part III of this brief.

Respectfully submitted,

JOHN H. SCHAFER
MICHAEL BOUDIN
DAVID J. CYNAMON

888 Sixteenth Street, N. W.
Washington, D. C. 20006

Attorneys for Respondent ITT Continental Baking Company, Inc.

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

August 1974

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1290

UNITED STATES OF AMERICA, PETITIONER

v.

ITT CONTINENTAL BAKING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

---

1. Relying largely on the dictum in *United States* v. *Armour & Co.,* 402 U.S. 673, 682, that "the scope of a consent decree must be discerned within its four corners," respondent contends that because the consent order in this case in terms prohibited only "acquiring" but not also "acquiring and retaining," the retention of assets acquired in violation of the order was not a continuing offense subject to separate penalties for each day the illegal retention continued. *Armour*, however, involved a quite different situation, and this Court's construction of the antitrust consent decree involved in that case as not barring Greyhound's acquisition of Armour does not support the court of appeals' ruling in this case that only a single penalty could be imposed for each of the illegal acquisitions and retentions.

Armour involved the consent decree in the *Meatpackers* case, which prohibited Armour from engaging in the retail food business and therefore would have barred Armour from acquiring Greyhound, because of Greyhound's food business. The question was whether the decree also barred Greyhound from acquiring Armour. The government's theory was that the purpose of the decree was to separate the meatpackers from the retail food business and that the acquisition of Armour by Greyhound would produce the very kind of interlocking relationship the decree sought to bar. This Court, however, declined to interpret the decree to include "a structural separation such as the Government claims" (*id.* at 680); it concluded that the decree "bars only active conduct on the part of the defendants" (*id.* at 678), but that "there is no prohibition against selling any interest to a grocery firm, or more generally against entering into an ownership relationship with such a firm" (*id.* at 679; footnote omitted).

The issue in *Armour* thus was whether Greyhound's acquisition of Armour violated the prohibition in the decree against Armour's engaging in the retail food business. This Court interpreted the decree as not prohibiting that acquisition, since it barred action only by Armour but not by Greyhound.

In the present case, however, the issue is not whether respondent violated the order—the court of appeals held that it had—but whether that violation continued as long as respondent continued to hold the illegally acquired assets. That question cannot be answered by the simplistic reasoning that because the order prohibited only the acquisition, the retention of assets acquired in violation of the order is not a "continuing failure or neglect" to obey the order within the meaning of the penalty provisions of the Clayton and Federal Trade Commission Acts.

Rather, as explained in our opening brief, the answer requires consideration of the purpose of the Commission proceeding, the objective of the order and the aim of the statutory penalty provisions to encourage compliance with Commission orders by imposing significant penalties for disobedience. As we there showed, the acquisition and retention of assets are integral parts of a single course of conduct, and it is the continued retention of the assets that produces the adverse economic effects Congress sought to prevent in Section 7 of the Clayton Act.

In this case, unlike *Armour,* the parties agreed that "[t]he complaint may be used in construing the terms of the order" (App. 73). The complaint charged that since 1952 respondent had acquired a substantial number of bakeries throughout the United States (App. 65-66) and that among the effects of those acquisitions has been the elimination of the acquired firms "as independent competitive factors in the manufacture, sale and distribution of bread and bread-type rolls" and a significant increase in "the trend to industry-wide concentration of the manufacture and sale" of those products (App. 67-68). Appendix A, attached to the agreement between respondent and Commission counsel, sets forth the reasons why the parties believed that the consent order was in the public interest (App. 72-73). It pointed out that under the order, which provided for divestiture of the nation's eighth largest baking company (App. 79) and the 10-year ban upon acquisitions, "the respondent's alleged continuous practice of acquiring companies baking and selling bread and bread-type rolls will be brought to a halt and the major acquisition forming the gravamen of the complaint will be undone" (App. 84).

The obvious purpose of the 10-year ban on acquisitions was to insure that during that period Continental's practice of acquiring bakeries "will be brought to a halt."

Respondent apparently recognizes (Br. 33) that the Commission may compel divestiture of assets acquired in violation of its order. Similarly, there could be little question that if an order required divestiture by a certain date, the retention of assets beyond that date would be a continuing violation for which daily penalties could be imposed. Cf. *United States* v. *Beatrice Foods Co.*, 403 F. 2d 1259, 1274 (C.A. 8), pending on petition for a writ of certiorari, No. 73-1798. The basic reason that leads to that result in those situations—that divestiture is required because retention of the assets violates the order—is equally applicable here. It compels the conclusion that the retention of assets acquired in violation of a Commission cease-and-desist order subjects the violator to separate penalties for each day it continues to hold the illegally acquired assets.

2. Respondent makes three additional arguments which, it asserts, it may submit as alternative grounds for affirmance of the court of appeals' judgment limiting the government to a single $5,000 penalty for each of the three acquisitions which the court held violated the order. These arguments, however, are not grounds for affirmance of the court of appeals judgment. One of the arguments would require reversal, and the other two are irrelevant to the question whether the government is entitled to daily penalties. Since respondent did not file a cross-petition raising those issues, it cannot now argue them. See the cases cited in our opening brief, p. 25.

a. Respondent contends (Br. 41-46) that none of the three challenged transactions constituted an "acquiring of assets" within the meaning of the consent order. The court of appeals held, however, that the three transactions violated the order (Pet. App. 4A-7A).[1] Since the district court had held that only two of the three transactions were illegal (Pet. App. 14A-15A) and had therefore assessed only two penalties, the court of appeals affirmed those penalties but remanded the case for the district court to assess a single penalty for the third violation (Pet. App. 9A-10A).

Although respondent apparently is willing to accept the judgment of the court of appeals subjecting it to single penalties for each of the three violations found, its argument that the transactions did not violate the order would lead not to affirmance of that judgment but

[1]In each transaction the bakery terminated its own manufacturing operation, and thereafter distributed Continental's bakery products to the same customers to whom it previously had distributed its own products (Pet. App. 4A-7A). The court of appeals held that "all three agreements accomplished the same purpose, which was to acquire indirectly such an interest or control in the business or the assets of the local baker so as to have him cease production" (Pet. App. 7A). In effect, as the court explained with respect to the Sheppard Baking Company transaction, which the district court had not considered to be a violation, respondent acquired "[t]he market and the volume" of the bakeries, which was one of their "principal asset[s]" *(ibid.)*. This reasoning reflected the district court's finding that "particularly in businesses where route salesmen are involved, customer lists have a peculiar value, and * * * they frequently represent the principal asset of a business" (Pet. App. 14A), and that the most important assets respondent acquired "were sales routes and sales volume" *(ibid.)*. These transactions violated the prohibition in the order against "acquiring directly or indirectly * * * any part of the * * * assets of any concern * * * engaged * * * in the production and sale of bread and bread-type rolls * * * " (App. 74).

to its reversal. For if Continental's acquisitions of the portion of the business of the three independent bakeries involved did not violate the order, then obviously no penalties, single or daily, could properly be assessed against it.

Respondent's argument thus constitutes a direct challenge to the judgment itself, rather than an alternative ground for affirming it. The argument seeks to overturn the fundamental premise of the judgment against it—the holding that the acquisitions violated the order. Such an attack upon a judgment, which if accepted would require reversal, can only be made by filing a cross-petition for certiorari.[2]

Our submission on this point is not inconsistent with the position the government recently took in its reply brief in *The Emporium Capwell Co.* v. *Western Addition Community Organization* and *National Labor Relations Board* v. *Western Addition Community Organization*, Nos. 73-696 and 73-830. In those cases the National Labor Relations Board held that an employer had not committed an unfair labor practice by discharging employees for engaging in concerted activity designed to compel the employer to bypass the union that represented them and bargain directly with them over allegedly racially discriminatory employment practices. The court of appeals, although upholding the Board's finding that the employees had attempted to bargain with the employer, set aside the order on the ground that the statute might protect the employees' conduct, and remanded the case to the Board to make additional findings it considered necessary to resolve that issue.

---

[2]Had such a petition been filed, it is unlikely that the Court would have granted it, since the court of appeals' ruling that the three tranactions violated the order turns upon the particular facts and has no significance beyond this situation.

The Board petitioned, arguing that the court of appeals had erred in ruling that in these circumstances employees had a right to attempt to bargain directly with the employer. In their brief on the merits, the employees argued that in fact they had not attempted to bargain with the employer but had sought only to redress grievances. The Board's reply brief stated that the employees' failure to cross-petition should not be viewed as barring them from arguing that the record did not support the Board's finding that they had attempted to bargain. It stated (Br. 3) that "a responding party who is willing to accept the judgment of a lower court should 'be under no obligation to file a petition or cross-petition as a protective measure in the event his opponent should seek Supreme Court review.' Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763, 779 (1974)."[3]

The situation in *Western Addition* is quite different from that here. In *Western Addition* the respondents sought to support the basic judgment of the court of appeals setting aside the Board's order. While their argument logically would lead to a modification of the court's judgment (eliminating one of the issues to be considered by the Board on remand), the respondents there were willing to accept the court of appeals' remand without modification.

In the present case, in contrast, the respondent does not accept the correctness of the court of appeals' judgment that the acquisitions violated the order, but instead seeks to argue that no violation occurred--that

[3] The Board went on to argue, however, that in its discretion the Court should not consider the issue, which raised only a factual question (Br. 4).

the judgment should have been entered in favor of it rather than the government. Thus, unlike the respondents in *Western Addition*, respondent here seeks to overturn the court of appeals' judgment. It cannot bring that issue before this Court without having filed a cross-petition for certiorari through the semantic sleight-of-hand device of saying that, although the ruling was incorrect, it nevertheless accepts it. The government's seemingly broad statement in *Western Addition* was not intended to cover the different situation here involved, and must be read in the light of the issue before the Court in that case.

b. Respondent also argues that because of the absence of a provision in the order making it applicable to "successors and assigns," respondent cannot be held liable for penalties incurred after it acquired Continental in September 1968 (Br. 46-52), and that neither it nor Continental may be subjected to daily penalties for the period following the Commission's own determination that the three transactions violated the order, because of the agency's failure to advise the company of its view (Br. 52-58).

The three acquisitions in this case occurred in July 1965 (Bon Ton), April 1966 (Wyoming Baking Company), and August 1966 (Sheppard Baking Company) (Pet. App. 4A-6A). Respondent concedes (Br. 52) that it is liable for Continental's violations of the order that took place prior to its acquisition of Continental. Since that acquisition occurred two and three years after the transactions that were held to violate the order, respondent's contention, even if accepted, would not support the court of appeals' judgment that penalties be limited to the single act of acquisition.

Respondent's argument would establish only that daily penalties could not be assessed after it acquired Continental in 1968; it would not establish that such penalties could not be assessed for the two or three years before that date when Continental held the illegally acquired assets.[4]

The same infirmity exists in respondent's third alternative ground for affirmance. Although the record does not show the date on which the Commission concluded that the three transactions violated the order, it was a substantial period after they took place. The parties stipulated (App. 51-52):

> [T]he staff of the Commission commenced an investigation in July 1966 involving certain of the operations of Continental as they related to the provisions of the Commission's consent order. This inquiry continued until July 10, 1968, at which time the staff formally reported to the Commission with respect to the results of such investigation and recommended that the Commission certify a civil penalty action to the Attorney General based upon the factual situations set forth in counts 1, 2 and 3 of the present complaint.

---

[4]Although the district court expressly held that respondent had assumed Continental's liabilities under the consent order (Pet. App. 16A), the court of appeals held that on the facts before it, this extended no further than respondent's concession of liability for violations prior to the merger (Pet. App. 7A-8A). The court did not consider whether, if the violations were continuing, the district court's determination would extend liability to the date of the complaint. This issue will have to be determined on remand, if the judgment is reversed.

> As part of the staff's inquiry, Continental was from time to time requested to supply information as reflected in various of the exhibits constituting attachments to the stipulation. The final request for information directed to Continental itself by the Commission's staff was on May 12, 1967 (S.E. 19). Two investigational hearings were conducted, one on May 2, 1967 (Sneesby, I.H.) and one on May 16, 1967 (Hebert, I.H.).

The commission certified the case to the Attorney General for the institution of a penalty suit on August 2, 1968 (App. 52, 128).

These facts show that a substantial time elapsed between the three transactions and the Commission's determination that they violated the order. Just as in the case of respondent's argument concerning successors and assigns, acceptance of respondent's notice contention could not result in affirmance of the court of appeals' judgment that the continuing retention of the illegally acquired assets did not give rise to daily penalties. That contention would only reduce the period for which daily penalties could be imposed.

These two contentions are issues to be considered in the first instance by the court of appeals or the district court upon remand, if this Court agrees with the United States that daily penalties are assessable for these violations of the order. There is no occasion for this Court to reach out to decide these additional questions, which the court of appeals did not reach. Cf. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 542; *Federal Trade Commission* v. *Borden Co.*, 383 U.S. 637, 646-647.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* ITT CONTINENTAL BAKING CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 73-1290. Argued November 13, 1974—Decided February 19, 1975

The civil penalty provisions of the Clayton Act, 15 U. S. C. § 21 (*l*), and the Federal Trade Commission Act, 15 U. S. C. § 45 (*l*), similarly provide in part that each separate violation of a Federal Trade Commission (FTC) cease-and-desist order issued under the respective Acts shall be a separate offense, except that in the case of a violation through "continuing failure or neglect to obey" a final order of the FTC each day of continuance of such failure shall be deemed a separate offense. After the FTC had charged the Continental Baking Co. (Continental), a bakery which later merged with respondent, with violations of § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act by various acquisitions of other bakeries, the parties agreed to a consent order prohibiting Continental from "acquiring" other bakeries. Thereafter, alleging that Continental had acquired assets in other companies in violation of this order, the Government brought suit for civil penalties to be imposed daily from the date of the contract of acquisition to the date of filing of the complaint. The District Court, while holding that the order had been violated, declined to order daily penalties, finding that the order proscribed only the initial act of acquisition, that the violations did not constitute "a continuing failure to neglect or obey" within the meaning of §§ 21 (*l*) and 45 (*l*), and that therefore only a single penalty might be imposed. The Court of Appeals affirmed that holding. *Held:* "Acquiring" as used in the consent order means both the initial transaction and the maintaining of the rights obtained without resale, and therefore violation of the order is a "continuing neglect or failure to obey" an FTC order within the meaning

Syllabus

of §§ 21 (*l*) and 45 (*l*) and thus subject to daily penalties thereunder. Pp. 7–19.

(a) The purpose of the "continuing failure or neglect to obey" provisions of §§ 21 (*l*) and 45 (*l*), as shown by their legislative history, to assure that the penalty provisions would meaningfully deter violations whose *effect* is continuing and whose detrimental *effect* could be terminated or minimized by the violator at some time after initiating the violation, would be undermined and the penalty would be converted into a minor tax if violation of an order prohibiting "acquiring" assets were treated as a single violation. Pp. 7–9.

(b) Since the consent order "as it is written" supports an interpretation that the act of acquisition continues until the assets are disgorged (see (c), *infra*), there is no need to determine whether §§ 21 (*l*) and 45 (*l*) would permit the imposition of daily penalties even if the consent order must be read, as respondent claims, to proscribe only the initial act of acquisition. Pp. 9–14.

(c) Under the consent order "as it is written," "acquiring" must mean both the act of first obtaining assets and the retention and use of those assets, since to conclude otherwise would be to ignore the flexibility of the English language, as well as the circumstances surrounding the order and the context in which the parties were operating. That conclusion is supported by both the "appendix" to the parties' agreement of which the order is a part and the complaint, as proper aids for construing the order which is to be construed basically as a contract. But even without the aid of these documents, "acquiring" as used in an antitrust decree or order continues until the assets are disgorged, since "acquiring" and related words as used in the antitrust context encompass the continuing act of obtaining certain rights and treating them as one's own. Pp. 14–19.

485 F. 2d 16, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, MARSHALL, WHITE, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 73–1290

United States, Petitioner, v. ITT Continental Baking Company. | On Writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

[February 19, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether violations of the prohibition of a Federal Trade Commission (FTC) consent order against "acquiring" other companies constituted single violations within the meaning of the applicable civil penalty statutes, 15 U. S. C. § 21 (*l*), 15 U. S. C. § 45 (*l*), or whether such violations constituted a "continuing failure or neglect to obey" within the meaning of those statutes, authorizing imposition of daily penalties. The United States District Court for the District of Colorado interpreted the consent order to proscribe only the initial act of acquisition and held that therefore only a single penalty might be imposed. 1972 CCH Trade Cases ¶ 73,993 (Aug. 2, 1971). The Court of Appeals for the Tenth Circuit affirmed the District Court to that extent, 485 F. 2d 16 (1973). A subsequent decision of the Court of Appeals for the Eighth Circuit is in conflict, *United States* v. *Beatrice Foods Co.*, 493 F. 2d 1259 (1974), cert. pending No. 73–1798. In interpreting a consent order worded in its pertinent terms similarly to that in this case, the Court of Appeals for the Eighth Circuit held that acquisition is a continuing offense until it is undone, noting that the construction of "acquiring"

as a single rather than continuing violation "ignores the crucial effects of an acquisition and would render non-acquisition orders virtually meaningless." 493 F. 2d, at 1270.

We granted certiorari in order to resolve this conflict between courts of appeals concerning the proper application of the continuing violation clauses of 15 U. S. C. §§ 21 (*l*) and 45 (*l*) to wording employed in a large number of FTC consent orders.[1] Since we interpret "acquiring" as used in the consent order in this case to mean both the initial transaction and the maintaining of the rights obtained without resale, we hold that violation of the consent order is a continuing violation subject to daily penalties, and reverse.[2]

[1] According to the Petition for Writ of Certiorari and Brief for the United States in this case, there were in all as of June 18, 1974, 68 FTC orders, of which most are consent orders but some are litigated orders, which bar acquisitions in language similar to the language of the order in this case. All of these orders bar future acquisitions but do not expressly bar the "holding" or "retention" of stock or assets acquired in violation of their terms.

[2] The petition for certiorari of the United States presented the single question whether its prayer for daily penalties was properly denied. Respondent did not cross-petition, yet seeks to raise several issues not presented by the petition. Respondent contends that (1) the three transactions for which penalties have been or are to be imposed did not violate the consent order; (2) the consent order was not binding upon ITT Continental as successor after Continental ceased to exist, so that daily penalties could not accrue for the period after the merger; and (3) daily penalties could not be imposed because the Commission had not advised respondent of the alleged violations prior to the filing of the complaint. We do not address any of these issues in deciding this case.

Respondent recognizes that not having cross-petitioned, it cannot attack the judgment insofar as it sustained the findings of violations and imposed penalties for such violations. *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435 (1924). Cf. *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185 (1937). Respondent argues that it may nevertheless seek to sustain

I

The FTC alleged in 1960 that Continental Baking Company ("Continental"),[3] a major producer of bread and other bakery products, had violated § 7 of the Clay-

the Court of Appeals' limitation on the penalties on the theory that no penalty should have been awarded at all. Ordinarily, however, as a matter of practice and control of our docket, if not of our power, we do not entertain a challenge to a decision on the merits where the only petition for certiorari presents solely a question as to the remedy granted for a liability found to exist, even if the respondent is willing to accept whatever judgment has already been entered against him. *Strunk* v. *United States*, 412 U. S. 434, 437 (1973); *NLRB* v. *International Van Lines*, 409 U. S. 48, 52 n. 4 (1972); *NLRB* v. *Express Publishing Co.*, 312 U. S. 426, 431–432 (1941). Cf. *Langnes* v. *Green*, 282 U. S. 531, 538 (1931). But see *LeTulle* v. *Scofield*, 308 U. S. 415 (1940). We follow that rule of practice in this case, particularly because the issue of whether there were any violations concerns only a particular order as applied to a discrete set of facts and therefore would not merit this Court's grant of a petition for certiorari.

The courts below did not decide the other two issues because they were not pertinent once it was determined that there was no continuing violation. (The District Court did express the opinion that "it would seem unreasonable to permit the Commission to knowingly let daily penalties accrue without giving notice of the Commission's position at the earliest reasonable time," 1972 CCH Trade Cases, at 92,129, but it said that this statement was "obiter dictum.") In the absence of decisions on these questions by the courts below, we decline to address them. *FTC* v. *Anheuser Busch, Inc.*, 363 U. S. 536, 542 (1960); *Jaffke* v. *Dunham*, 352 U. S. 280 (1957); *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U. S. 464, 468 (1947). Cf. *Dandridge* v. *Williams*, 397 U. S. 471, 476, n. 7 (1970).

[3] Continental was merged on September 13, 1968, with a wholly owned subsidiary of International Telephone and Telegraph Corporation called ITT Continental Baking Company ("ITT Continental"). While ITT Continental has never contested its liability under the merger agreement for any violations of the consent order committed by Continental before the merger, it continues to maintain in this Court, as it did below, that it is not itself bound by the consent order. See n. 2, *supra*.

ton Act, 15 U. S. C. § 18, and § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, by various acquisitions which "may have the effect of substantially lessening competition or tending to create a monopoly. . . ." Before any decision in the case, the parties agreed to a proposed consent order which was approved by the Commission in May 1962. The order, among other things, prohibited Continental for 10 years [4] from "acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or noncorporate, engaged in any State of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order permits such an acquisition. . . ." Alleging that Continental had acquired assets in three companies in violation of this order, the Government brought suit in the District of Colorado under § 11 (*l*) of the Clayton

[4] The consent order expired by its own terms on May 15, 1972. In April 1972, the FTC ordered ITT Continental Baking Company to show cause why the order's ban on acquisitions should not be extended until April 1977. Although the administrative law judge recommended the extension, the FTC declined to approve the extension because of inadequate proof of increased concentration in the relevant, local markets. *In the Matter of ITT Continental Baking Co.*, No. 7880, — F. T. C. — (1974). However, the Commission did express a continuing concern with the levels of concentration in the baking industry. It issued an order requiring ITT Continental to inform the Commission "of any acquisitions of any interest in any concern engaged in the production and sale of bread and bread-type rolls, such report to be filed not less than sixty (60) days prior to each such acquisition." *Id.*, at —. ITT Continental and other members of the baking industry were informed that "Any significant mergers in this industry, and particularly any that promises to raise concentration still higher in a metropolitan area that already appears to be dangerously close to the borderline between effective competition and effective monopoly, will receive the most searching attention from this agency." *Id.*, at —.

Act, 15 U. S. C. § 21 (*l*)[5] and § 5 (*l*) of the Federal Trade Commission Act, 15 U. S. C. § 45 (*l*),[6] for civil penalties and other relief. The complaint prayed for penalties of $1,000 per day from the date of the contract of acquisition to the day of filing of the complaint on each of the three counts.

---

[5] 15 U. S. C. § 21 (*l*) provides:

"(*l*) Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense."

[6] 15 U. S. C. § 45 (*l*) provides:

"(*l*) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense."

The maximum penalty for each violation under both 15 U. S. C. § 21 (*l*) and 15 U. S. C. § 45 (*l*) has since been increased from $5,000 to $10,000. Pub. L. 93-153, § 408 (c), 87 Stat. 591.

Although the Government requested $1,000 per day per violation, the statutes prescribe no minimum penalty, and the District Court has discretion to determine the amount of the penalty for each violation whether the transactions are construed as single or as continuing violations. Thus, while totalling the penalty as a series of daily violations rather than as a single violation could raise substantially the total penalty assessed, the statutory scheme does not require that result, and the trial judge's determination would prevail in the absence of an abuse of discretion.

The District Court held that two of the three transactions were in fact in violation of the consent order. It declined, however, to order daily penalties, finding that "the terms of the consent order proscribe only the act of acquisition and that the violations of the consent order . . . did not constitute a 'continuing failure or neglect to obey' [15 U. S. C. §§ 21 (*l*), 45 (*l*)] said order. . . . Once these two acquisitions were accomplished, the violations were complete." 1972 CCH Trade Cases, at 92,129. The District Court therefore entered a judgment against ITT Continental for $5,000 for each of the two violations found.[7]

The Court of Appeals reversed the District Court only insofar as it had held one of the three transactions not in violation of the consent order. It affirmed on the matter of daily penalties, holding that "whether the order was directed to the acquisition or to the acquisition and retention of assets or interests . . . [is] an interpretation of the consent order, and the result is in accordance with the prevailing standards." 485 F. 2d, at 21. Remand to the District Court was ordered only for imposition of a penalty for the third violation.

---

[7] The complaint also requested a permanent injunction enjoining future compliance with the consent order. The District Court found that it was empowered in a civil penalty proceeding based on an FTC order to grant equitable relief, and it issued an injunction in the exact words of the FTC order. This injunction expired, as did the consent order, on May 15, 1972. See n. 4, *supra*. Since the Court of Appeals decision in this case, Congress has amended 15 U. S. C. § 45 (*l*) expressly to empower district courts in civil penalty proceedings to grant equitable relief. Pub. L. 93-153, § 408 (c), 87 Stat. 591.

Although the complaint did not request a divestiture order, the Government later requested divestiture, and this request was embodied in the District Court's pretrial order. App., at 27. However, the District Court declined to order this relief, 1972 CCH Trade Cases at 92,129, and the Court of Appeals affirmed this denial as within the discretion of the trial court. 485 F. 2d, at 21.

II

The basic question before us is whether there has been a "continuing neglect or failure to obey" an FTC order within the meaning of 15 U. S. C. §§ 21 (*l*) and 45 (*l*).

The "continuing failure or neglect to obey" provision of § 45 (*l*) was added to the Federal Trade Commission Act in 1950, and the like provision of § 21 (*l*) to the Clayton Act in 1959. Although the legislative history of these provisions is sparse, some examples of behavior intended to be covered by the "continuing" violation provisions do appear in the legislative history. These include continuing conspiracies to fix prices or control production, maintenance of a billboard in defiance of an order prohibiting false advertising, failure to dissolve an unlawful merger, and failure to eliminate an interlocking directorate. See Letter from FTC General Counsel to Senator Fulbright, 96 Cong. Rec. 3026–3027 (1950); Hearings on H. R. 432, H. R. 2977, H. R. 6049, and S. 726 before the Antitrust Subcommittee of the House Judiciary Committee, 86th Cong., 1st Sess., 21 (1959); H. R. Rep. No. 580, 86th Cong., 1st Sess., 7 (1959). These violations share two discernable characteristics: the detrimental effect to the public and advantage to the violator of each continues and increases over a period of time, and the violator could eliminate the effects of the violation if it were motivated to do so, after it had begun. Without these characteristics, daily penalties for such violations would probably have no greater deterrent effect than a single penalty and accumulating daily penalties would therefore be unfair.

The legislative history also makes clear that Congress was concerned with avoiding a situation in which the statutory penalty would be regarded by potential violators of FTC orders as nothing more than an acceptable cost of violation, rather than as a deterrence to violation. For example, Senator Aiken, chief proponent of the 1950

amendment, said that if daily penalties for certain violations of the Federal Trade Commission Act were not permitted, "the fine would amount to a license in the amount of $5,000 for misrepresentation, which would be a very cheap fine, indeed." 96 Cong. Rec. 3025 (1950). Similarly, the House of Representatives Judiciary Committee said in its report on the 1959 amendments:

> "Although the maximum penalty may be severe, in certain cases it would be appropriate. In the absence of the maximum penalty for a continuing offense, for example, commission and board orders with respect to mergers and interlocking directorships would be ineffective. In such cases, unless the maximum penalty applied and each day of a continuing violation considered a separate offense, an order dissolving an unlawful merger could be ignored after the mere payment of a $5,000 fine."

H. R. Rep. No. 580, 86th Cong., 1st Sess., 7 (1959). See also Hearings on H. R. 432, H. R. 2977, H. R. 6049, and S. 726, *supra*, at 30 (Letter from FTC General Counsel).

Thus, the "continuing failure or neglect to obey" provisions of 15 U. S. C. §§ 21 (*l*) and 45 (*l*) were intended to assure that the penalty provisions would provide a meaningful deterrence against violations whose *effect* is continuing and whose detrimental *effect* could be terminated or minimized by the violator at some time after initiating the violation. It seems apparent that acquisition in violation of an FTC order banning "acquiring" certain assets could be such a violation. Any anticompetitive effects of an acquisition continues as long as the assets obtained are retained, and the violator could undo or minimize any such effect by disposing of the assets at any time after the initial transaction. On the other

hand, if violation of an order prohibiting "acquiring" assets were treated as a single violation, any deterrent effect of the penalty provisions would be entirely undermined, and the penalty would be converted into a minor tax upon a violation which could reap large financial benefits to the perpetrator. As we have seen, Congress added the continuing penalty provisions precisely to avoid such a result.

III

Respondent insists, however, that the underlying FTC order was a consent order proscribing only the initial act of acquisition, and that therefore the imposition of daily penalties which might otherwise be mandated cannot be permitted. Their argument is that "acquiring" in the consent order unambiguously refers only to the initial transaction, and that to read it otherwise is to add the words "holding" or "retaining" assets to the literal language of the order. This addition to the language of the order, ITT Continental contends, violates the principle of a line of cases culminating in *United States* v. *Armour & Co.*, 402 U. S. 673 (1971), that any command of a consent decree or order must be found "within its four corners," 402 U. S., at 682, and not by reference to any "purposes" of the parties or of the underlying statutes. See *United States* v. *Atlantic Refining Co.*, 360 U. S. 19 (1959); *Hughes* v. *United States*, 342 U. S. 353 (1952). Respondents ask us to conclude that the "acquirings" prohibited by the consent order are not capable of persisting over time, and that therefore there can be no "continuing failure or neglect to obey" the order. The Government, on the other hand, contends that the parties meant "acquiring" to include both purchase and retention of assets, and that therefore it is unnecessary to depart from the "four corners" rule of *Armour* to conclude that there has been a continuing violation.

In *Armour*, it was first determined that the construction of the consent decree urged by the Government was inconsistent with the express terms of the consent decree it was seeking to enforce.[8] The decree involved in *Armour* was the Meatpackers Consent Decree of 1920, entered in settlement of an antitrust case filed in district court. Paragraph Four of the decree enjoined Armour from engaging in certain businesses. The Greyhound Corporation, which was engaged in some of those businesses, acquired control of Armour. The Government claimed that this acquisition was in violation of the consent decree, contending that the purpose of the decree was structurally to separate the meatpackers from the retail food business entirely, and that the relationship between Armour and Greyhound was therefore prohibited.

The Court noted that the language of the decree "*taken in its natural sense*, bars only active conduct on the part of the defendants. . . . [T]he decree does not speak in terms of relationships in general, but, rather, prohibits certain behavior, and in doing so prohibits some but not all economic interrelationship between Armour and the retail food business. . . . In short, we do not find in the decree a structural separation such as the Government claims. . . . [T]he decree leaves gaps *in-*

---

[8] The Court in *Armour* noted that the Government might be able to obtain the relief sought in ways other than by construction of the consent decree. First, it could have brought a new action to enjoin the acquisition under § 7 of the Clayton Act. Second, "if the Government believed that changed conditions warranted further relief against acquisition, it could have sought modification of the Meatpackers Decree itself." 402 U. S., at 674–675. Respondents argue that these alternatives are also present in this case, and that it is therefore unnecessary to adopt the construction of the order urged by the Government. However, the possible availability of other means of obtaining sanctions against the acquisitions challenged here cannot preclude the Government from obtaining whatever penalties may be proper for violations of the consent order.

consistent with so complete a separation." 402 U. S., at 678–680. (Emphasis supplied.)

Similarly, in both *Atlantic Refining* and *Hughes* the Court first undertook to determine whether the language of the decree could support the construction urged by the Government and concluded that it could not. In *Hughes,* the decree provided that Hughes was *either* to dispose of his stock in certain corporation *or* commit the voting rights of his stock to a trustee "until [he] shall have sold his holdings of stock." 353 U. S., at 355. The Court said that "A reading of the either/or wording *would make most persons believe* that Hughes was to have a choice of two different alternatives. Hughes would have no such choice if the first 'alternative' was to sell the stock and the second 'alternative' was also to sell the stock." 342 U. S., at 356. (Emphasis supplied.) Therefore, the Court concluded, the consent decree could not be construed, as the Government desired, to require Hughes to sell his stock.

In *Atlantic Refining,* the Court concluded that the construction urged by the Government was a "strained construction." 360 U. S., at 22, inconsistent with the "normal meaning," 360 U. S., at 23, of the language used. It commented that if the parties had intended the meaning urged by the Government, "one can hardly think of less appropriate language." 360 U. S., at 22.

In all three of these cases, it was only *after* concluding that the language, fairly read, could not support the Government's construction that the Court turned to the contention that the restrictive reading was inconsistent with the purposes of the decree and of the antitrust laws assertedly violated. It was in this context that the Court noted that, because consent decrees are normally compromises in which the parties give up something they might have won in litigation and waive their rights to litigation, it is inappropriate to search for the "purpose" of a con-

sent decree and construe it on that basis. "[T]he *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. . . . [T]he instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation."[9] *Armour*, 402 U. S., at 681–682. Thus, the basic import of *Armour, Atlantic Refining,* and *Hughes* is that, since consent decrees and orders have many of the attributes of ordinary contracts,[10] they should be construed basically as con-

[9] In *Hughes*, the Court likewise rejected an invitation to further the asserted "purposes" of the consent decree by approving an interpretation the "language cannot support." 342 U. S., at 356. It noted that evidence might show that the sale requirement was justified, but it regarded the construction urged by the Government as effecting "a substantial *modification* of the original decree." [Emphasis supplied.] 342 U. S., at 357. While it believed this modification could be had after a proper hearing proving the need for such modification under applicable standards, it would not sanction such modification in the guise of construing a consent decree. 342 U. S., at 357–358.

Similarly, in *Atlantic Refining,* while the Court agreed that the interpretation offered by the Government might better effectuate the purposes of the Acts assertedly violated, this "does not warrant our substantially *changing* the terms of a decree to which the parties consent without any adjudication of the issues. And we agree with the District Court that accepting the Government's present interpretation would do just that." 360 U. S., at 23. (Emphasis supplied.) Again, the Court noted that modification might be appropriate, but modification disguised as construction was not. See also *Liquid Carbonic Corp.* v. *United States,* 350 U. S. 869 (1955), reversing 123 F. Supp. 653 (EDNY 1954); *United States* v. *International Harvester Co.,* 274 U. S. 693 (1927).

[10] Consent decrees and orders have attributes both of contracts and of judicial decrees, or, in this case, administrative orders. While they are arrived at by negotiation between the parties and often

tracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation.

We note that this case differs from *Armour*, *Hughes*, and *Atlantic Refining* in a most important respect. In each of those cases the question of whether or not the consent decree was violated was the question for decision; in this case respondent was found to have committed violations, and the issue before us affects only the manner of assigning penalties for each violation found. Thus, respondent is subject to some penalty, and there is no possibility as there was in *Armour*, *Atlantic Refining*, and *Hughes* that respondent will be penalized for behavior not prohibited at all by the order "within its four corners," *United States* v. *Armour & Co.*, 402 U. S., at 682. Nothing in the consent order suggests that although the parties agreed that Continental would refrain from "acquiring," they also agreed to limit the penalties which would otherwise apply if respondent did not refrain from that behavior. Such an agreement would be exceedingly odd, for it would undermine whatever prohibitions were imposed. As we have seen, Part II, *supra*, it is quite possible that under §§ 21 (*l*) and 45 (*l*) violation of an FTC adjudicated order against "acquiring" would be subject to daily penalties. It is not clear that *Armour* would require a different result merely because we are dealing with a consent order, since the parties reached

---

admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the Court or administrative agency. Compare *United States* v. *Swift & Co.*, 286 U. S. 106, 115 (1932), with the language in *Armour* cited in the text, p. —, *supra*. Because of this dual character, consent decrees are treated as contracts for some purposes but not for others. See Jinkinson, Negotiation of Consent Decrees, 9 Antitrust Bull. 673, 675–676 (1964); Handler, Twenty-fourth Annual Antitrust Review, 72 Col. L. Rev. 1, 33–34 (1972).

no agreement at all concerning penalties to be applied in case of violation of the order.

We need not, however, determine whether §§ 21 (*l*) and 45 (*l*) would permit the imposition of daily penalties even if the consent order must be read as respondent maintains to proscribe only the initial act of acquisition. For we agree with the Government that the order "as it is written" does support an interpretation that the act of acquisition continues until the assets acquired are disgorged.

IV

Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree.[11] Such reliance does not in any way depart from the "four corners" rule of *Armour*.

In this case, the consent order was part of an agreement between the parties entitled "Agreement Containing Consent Order to Divest and to Cease and Desist." The agreement incorporates by reference an "appendix," which sets forth at length the background leading to the complaint and the proposed order. In addition, the agreement provides that "[t]he complaint may be used in construing the terms of the order." Since the parties themselves so provided, both the appendix and the com-

---

[11] "Assuming that a consent decree is to be interpreted as a contract, it would seem to follow that evidence of events surrounding its negotiation and tending to explain ambiguous terms would be admissible in evidence." Handler, Twenty-fourth Annual Antitrust Review, 72 Col. L. Rev. 1, 23 n. 148 (1972).

plaint are proper aids to the construction of the order and of the agreement of which it is part.[12]

The complaint alleged that Continental had pursued "a continuous practice of *acquiring* various bakeries throughout the United States," (emphasis supplied), which were thereby "eliminated . . . as independent competitive factors in the manufacture, sale and distribution of bread and bread-type rolls . . . ." If the "acquiring against which the order and the complaint incorporated in it was directed were limited to the single transaction by which Continental obtained rights in another company, it is hard to see why the effect which the complaint alleged followed from acquisitions would necessarily occur. For if Continental had sold the companies acquired as soon as the initial transactions were completed to other, independent companies, the bakeries would not have been "eliminated . . . as independent competitive factors."

Reference to the appendix also supports the conclusion that "acquiring" as used in the order means both the initial transaction granting Continental rights in an independent bakery and the maintaining of those rights without resale. The appendix notes that "One of the principal problems in the baking industry is the tendency

[12] Respondent argues that even if the complaint and appendix can be used as aids to construction, they only show that the parties could use broader language than that in the order itself, making the limited language actually used highly significant and controlling. One Court of Appeals has used similar reasoning to approve a strict reading of a consent decree which was accompanied by a collateral agreement. *Artvale, Inc.* v. *Rugby Fabrics Corp.*, 303 F. 2d 283 (CA2 1962). However, this reasoning is erroneous as applied to this case. Where parties in one agreement include both a consent order and an explanation of that order, and also provide that the complaint is to be used to construe the order, it seems logical to conclude that, at least as to interpretations not precluded by the words of the order itself, the collateral documents can and should be used to give meaning to the words of the order.

towards concentration and the continuous growth of major baking companies *through acquisition.* Such *acquisitional growth* and tendency towards concentration places in the hands of a few large companies the means to set the pattern of competition. . . . If this order is adopted by the Commission, the respondent's alleged continuous practice of *acquiring* companies baking and selling bread and bread-type rolls will be brought to a halt . . . ." (Emphasis supplied.) It is apparent that the "acquisitional growth" referred to in the appendix cannot be achieved merely by discrete transactions without reference to what is done with the assets obtained after those transactions. If Continental were merely a speculator in banking companies, buying assets in them and selling them soon thereafter, it would not necessarily create "through acquisition" a "tendency towards concentration" giving it the "means to set the pattern of competition." Thus, "acquiring" in both the appendix and the order, parts of the same agreement, must mean obtaining and retaining assets, not merely the former.

Even without the aid of these explanatory documents properly usable to construe this particular order, we would have to conclude that "acquiring" as used in an antitrust decree or order continues until the assets obtained are disgorged. As the forgoing analysis of the ancillary documents here illustrates, "acquiring" and related words do not, as respondent insists, unambiguously refer to a single transaction. Rather, as a matter of ordinary usage they can, and in the antitrust context they do, encompass the continuing act of obtaining certain rights and treating them as one's own. We must assume that the parties here used the words with the specialized meaning they have in the antitrust field, since they were composing a legal document in settlement of an antitrust complaint.

We need not go beyond the Clayton Act itself to conclude that "acquisition" as used in § 7 of the Act means holding as well as obtaining assets. The Act provides that the FTC, if it finds a violation of § 7, can require a party to "divest itself of the stock, or other share capital, or assets, *held . . . contrary to the provisions* of [§ 7 of the Clayton Act]." 15 U. S. C. § 21 (b). (Emphasis supplied.) Thus, the framers of the Act did not regard the terms "acquire" and "acquisition" as unambiguously banning only the initial transaction of acquisition; rather, they read the ban against "acquisition" to include a ban against holding certain assets.

This Court's opinions reflect the same understanding. For example, in *FTC* v. *Western Meat Co.*, 272 U. S. 554 (1926), the Court, in discussing an FTC order based on a violation of § 7, said that "The order here questioned was entered when respondent actually *held and owned* the stock *contrary to law.* The Commission's duty was to prevent *continuance of this unlawful action* by an order directing that it cease and desist therefrom and divest itself of *what it had no right to hold.*" 272 U. S., at 559. (Emphasis supplied.) See also *Arrow-Hart & Hegeman Elec. Co.* v. *FTC*, 291 U. S. 587, 596–599 (1934).

Similarly, this Court's opinion in *United States* v. *du Pont*, 353 U. S. 586 (1957), rests upon the conclusion that "acquisition" can mean, and in the context of § 7 of the Clayton Act does mean, both the purchase of rights in another company and the retention of those rights.

In *du Pont*, a § 7 case was brought in 1949 but based on a purchase of stock by du Pont in 1917–1919. It was argued that "the Government could not maintain this action in 1949 because § 7 is applicable only to the acquisition of stock and not to the holding or subsequent use of stock." 353 U. S., at 596–597. Thus, du Pont was

seeking to interpret "acquire" as used in § 7 [13] much as respondent here seeks to read "acquiring" in the consent decree.

The Court in *du Pont* rejected the interpretation urged upon it. Instead, the Court held that there is a violation "any time when the acquisition threatens to ripen into a prohibited effect. . . . To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that may lead to a restraint of commerce or tend to create a monopoly of a line of commerce." 353 U. S., at 597. Thus, there can be a violation at some time later even if there was clearly no violation—no realistic threat of restraint of commerce or creation of

---

[13] The first paragraph of § 7, at the time the *du Pont* case was brought, provided:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

The statute was amended in 1950 to provide:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

While the change in the wording is substantial, no reason suggests itself why the meaning of "acquire" and "acquisition" should differ in the two versions. *Du Pont* was decided several years after the 1950 amendments and makes not the slightest suggestion that the result pertinent here would not obtain under the new version.

a monopoly—at the time of the initial acts of acquisition. Clearly, this result can obtain only because "acquisition" under § 7 is not a discrete transaction but a status which continues until the transaction is undone.[14]

Thus, under the order "as it is written" "acquiring" must mean both the act of first obtaining assets and the retention and use of those assets. To conclude otherwise would be to ignore the flexibility of the English language, as well as the circumstances surrounding the order and the context in which the parties were operating. And, since the order bans the continuing act of obtaining and retaining certain assets, a violation of the order is a "continuing failure of neglect to obey" it, and daily penalties may be imposed under 15 U. S. C. §§ 21 (*l*) and 45 (*l*).

Because the Court of Appeals erred in concluding that daily penalties could not be imposed, we reverse and remand for proceedings consistent with this opinion.

It is so ordered.

---

[14] The dissent in *du Pont* recognized that this was the import of this holding, with which it disagreed. 353 U. S., at 619–621 (Burton, J., dissenting).

Some lower federal courts have also recognized that the status approach to acquisition is the proper one. See *Gottesman* v. *General Motors Corp.*, 414 F. 2d 956, 965 (CA2 1969): "[T]he very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 [in *du Pont*] continued through 1961 . . . . [W]hat was unlawful was du Pont's *status* as stockholder in General Motors, and that status continued until divestiture." (Emphasis supplied); *United States* v. *Schine*, 260 F. 2d 552, 555–556 (CA2 1958): "[I]t is the *maintenance* of conditions in violation of the decree [prohibiting acquisitions, among other things] which is the charge against respondents." Therefore, the court in *Schine* concluded, it was irrelevant that the initial transactions occurred prior to the statutory limitations period.

SUPREME COURT OF THE UNITED STATES

No. 73-1290

United States, Petitioner, *v.* ITT Continental Baking Company.	On Writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

[February 19, 1975]

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

The respondent Continental made corporate acquisitions in violation of a 1962 consent order that, in pertinent part, prohibited Continental from "acquiring" described baking companies. The Government sought to impose daily penalties upon Continental for the continued holding of those assets. The Government's theory was that daily penalties were appropriate because Continental's retention of the assets was a "continuing failure or neglect to obey a final order," within the meaning of the relevant civil penalties statutes, 15 U. S. C. §§ 21 (1), 45 (1).[1] The issue in this case is whether the consent order can be so construed.[2] The District Court and the Court of Appeals ruled that the consent order prohibited only the distinct acts of "acquiring" the bakeries, not the "retaining" or the "holding" of the assets after acquisition. The Court of Appeals indicated that an order to divest would have been an appropriate remedy for the unlawful acquisitions, but held that the retention of the assets was not in itself a continuing refusal to obey the

[1] These provisions are set out in full in the Court's opinion, *ante*, at 5 nn. 5, 6.

[2] For the reasons stated by the Court, I agree that the other issues that the respondent seeks to raise in this case need not and should not be addressed.

consent order such as would support the sanction of daily penalties. I think that under our controlling precedents, the District Court and the Court of Appeals were clearly correct.

The governing rule of construction, and its rationale, were stated plainly and aptly by this Court in *United States* v. *Armour & Co.*, 402 U. S. 673, 681–682 (1971):

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. *For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.* Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." (Emphasis added) (footnote omitted.)

See also *United States* v. *Atlantic Refining Co.*, 360 U. S. 19 (1959); *Hughes* v. *United States*, 342 U. S. 353 (1952).

The application of this straightforward standard to the consent order here is hardly a difficult task. The order literally prohibits only the "acquiring" of the forbidden assets. Once an acquisition was consummated, the violation was complete. A prohibition on the retention of assets cannot be found in any provision of the order. Because the order is a compromise agreement negotiated without any adjudication of antitrust liability, we are not at liberty under *Armour* to construe the unambiguous term "acquiring" in the light of conjecture or argument about the "purposes" of the decree or of the parties. We may not, consistent with *Armour,* conclude that the Government intended that the order should prohibit as a continuing offense the retention of unlawfully acquired assets, when the Government did not insist upon language objectively manifesting that intention. Nor may we conclude that Continental agreed to restrict its future business conduct or become subject to penalties in any manner not clearly delineated in the order itself. The provisions of the order are something less than the Government could have sought and might have obtained. The rule of construction of consent decrees, however, depends not upon an expedient construct of what the parties are thought to have intended, but upon the explicit provisions to which the parties have agreed.

After giving a casual nod in the direction of the standard of construction required by *Armour,* the Court embarks upon a laborious search for "purposes" that are "incorporated in" the consent order in order to change the meaning of the unambiguous term "acquiring." We are led through the antecedent complaint, through an appendix to the consent order, through the intricacies of an opinion of this Court construing the term "acquisition" in light of the policies underlying the Clayton Act, and through the legislative history of the statutory pro-

visions that impose daily penalties for continuing refusals to obey Commission orders. Drawing upon these disparate sources, the Court determines that the consent order, despite its literal language, must be construed to prohibit not only the proscribed acquisitions but also the "retention" of unlawfully acquired assets.[3] One is reminded of an observation once made by Mr. Justice Grier in a somewhat different context: "[T]he fact that it required so ingenious and labored an argument by my learned brother to vidicate such a construction . . . seems to me, of itself, conclusive evidence that the construction should not be given to it." *Chenango Bridge Co.* v. *Binghamton Bridge Co.*, 70 U. S. (3 Wall.) 51, 83 (dissenting opinion).

What the Court does today is to proclaim a new rule of construction for consent orders or decrees totally at odds with our previous decisions:

> "Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance

[3] Upon this premise, the Court then proceeds to hold that the conjured-up "continuing offense" of retaining these assets is a "continuing failure or neglect to obey a final order" within the meaning of the daily penalty statutes. 15 U. S. C. §§ 21 (*l*) and 45 (*l*). But even if the consent order could be correctly read to prohibit not only the acquisition of the described assets but also the retention of assets unlawfully acquired, it is far from crystal clear that the "continuing offense" of retaining the assets would be a "continuing failure or neglect to obey a final order" within the meaning of the daily penalty statutes. Penalty provisions must be strictly construed, and due process requires that such provisions must give fair warning of the conduct that invokes their extraordinary sanction. Cf. *Giacco* v. *Pennsylvania*, 382 U. S. 399 (1966). The legislative history of the daily penalty statutes, as recited in the Court's opinion, shows that the mischief sought to be remedied was precisely the mischief to which Congress addressed its language: a "continuing failure or neglect to obey a final order," as, for example, the refusal to divest after a specific order of divestiture has been entered.

> upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of any consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree." *Ante*, at 14.

This novel approach, for which the Court cites not a single supporting precedent, is directly contrary to the "four corners" rule of *Armour*. For an inquiry into the *purpose* of a consent decree is precisely what that rule forecloses: "[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." 402 U. S., at 682. The Court today thus indulges in precisely the exercise that *Armour* sought to preclude: a wide-ranging search for a "purpose" in a decree that, as explained in *Armour*, cannot be said to have a purpose except to delineate explicitly the terms and provisions of the settlement that the parties negotiated.[4]

---

[4] Whatever the utility of extrinsic aids in construing a typical commercial contract, this technique is singularly inappropriate in an area where certainty of prohibition is necessary and where, as *Armour* makes clear, there can be found no guiding purpose underlying a negotiated decree. Moreover, even assuming, *arguendo*, that such aids might be admissible to construe borderline issues of application—for example, whether a particular acquired company was engaged in the production of "bread-type" rolls within the meaning of the consent order—such aids must not be used to impose a wholly separate prohibitory requirement upon a company that consented to be bound only by the plain language of the consent order. This is demonstrably not a case of ambiguity or of borderline construction. It is a case, instead, where the Court has used extrinsic aids to alter a term that is, on its face, wholly unambiguous.

The Court relies upon the decision in *United States* v. *du Pont*, 353 U. S. 586 (1957), for the proposition that the term "acquire" in a consent order is a term of art that prohibits a "status which continues until the transaction is undone." *Ante*, at 19. But the

Before straining to pull the Government's chestnuts out of the fire, the Court should count with greater care the costs of abandoning the rule stated in *Armour*. Until today, the parties to any consent decree could have confidence that its explicit terms alone would control the judicial construction of its prohibitory language. Now, otherwise unambiguous terms of a consent decree may be construed in light of such considerations as the antecedent complaint, the "meaning" of antitrust decisions, and the policies said to underlie the statutory provision for daily penalties. Certainty and reasoned reliance have always been the *sine qua non* of the consent orders that terminate about 70 to 80% of the antitrust complaints that are filed by the Justice Department.[5] But after today's decision that kind of certainty will no longer exist. For there will be no apparent limit on the power of the judiciary to alter the plain language of a decree in light of the "circumstances surrounding the order and the context in which the parties were operating." *Ante*, at 19. If a negotiated consent decree fails to leave a dispute clearly and firmly settled, the necessary result will be that those charged with antitrust violations will be less inclined to settle their cases and more apt to insist upon time-consuming and costly litigation. Today's decision will also pose serious difficulties for the enforcement of all existing and all future consent decrees. For,

---

Court's reliance on the policy considerations discussed in the *du Pont* opinion is wholly inconsistent with the *Armour* rule. The opinion in *United States* v. *du Pont* does not, in any event, render the term "acquiring" in a consent decree a term of art. That case addressed the positive reach of the Clayton Act under certain circumstances. The Court fails to explain how its opinion there has served to transform the plain term "acquiring" into a "term of art" that would by common understanding have the meaning that the Court today ascribes to it.

[5] Note, 73 Col. L. Rev. 594 (1973).

as Mr. Justice Jackson once observed, "the validity of a doctrine does not depend on whose ox it gores." [6] The same purpose-oriented techniques of construction that the Court today serves up to expand this consent order beyond its terms can be expected to be availed of by alleged violators of consent orders who will seek to narrow and thereby to evade the plain language of any prohibition.

The Court concludes that "if violation of an order prohibiting 'acquiring' assets were treated as a single violation, any deterrent effect of the penalty provisions would be entirely undermined, and the penalty would be converted into a minor tax upon a violation which could reap large financial benefits for the perpetrator." *Ante,* at 8–9. This is not merely overstatement; it is incorrect. Both the parties agree, and the Court of Appeals held, that an order to divest unlawfully acquired assets is an appropriate remedy for violation of a consent order barring acquisition. Moreover, the *Armour* rule of construction would not impair in any way the power of the Government, in future cases, to obtain through negotiations consent orders that contain a clear and explicit description of the conduct that is prohibited.[7]

In my view, the Court's departure from precedent threatens to retard significantly the effective use of consent decrees in the administration of the antitrust laws. I would adhere to the rule stated in *Armour* that "the scope of a consent decree must be discerned within its

[6] *Wells* v. *Simonds Abrasive Co.,* 345 U. S. 514, 525 (1953).

[7] The Government informs us that as of May 1974 there were outstanding 54 consent orders with language that prohibits acquiring certain assets but does not expressly prohibit the retaining of these assets. This Court need not assume that flagrant violations of consent orders will occur, nor that the remedies of divestiture and fine for the single offense of acquisition will not adequately deter unlawful conduct.

four corners, *and not by reference to what might satisfy the purposes of one of the parties to it.*" 402 U. S., at 682 (emphasis added). Applying this standard, I would affirm the considered judgments of the District Court and the Court of Appeals.